MASSACHUSETTS REPORTS

181

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

FEBRUARY 1902 — JUNE 1902

HENRY WALTON SWIFT

REPORTER

BOSTON
LITTLE, BROWN, AND COMPANY
1903

UNIVERSITY PRESS:
JOHN WILSON AND SON, CAMBRIDGE, U.S.A.

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. OLIVER WENDELL HOLMES, CHIEF JUSTICE.
HON. MARCUS PERRIN KNOWLTON.
HON. JAMES MADISON MORTON.
HON. JOHN LATHROP.
HON. JAMES MADISON BARKER.
HON. JOHN WILKES HAMMOND.
HON. WILLIAM CALEB LORING.

ATTORNEY GENERAL.

HON. HERBERT PARKER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

CHARLES R. BATT & another, executors, *vs.* JESSIE S. HENDERSON & others.

Suffolk. January 21, 1902. — February 28, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Devise and Legacy, Construction, Perpetuities.

The residuary clause of a will gave the residue to trustees to hold until January 1, 1901, and to pay the income, one quarter in reduction or payment of any mortgages on the testator's real estate, one quarter to his widow, and the remaining one half to four children named and their issue, and, after all the mortgages had been paid and discharged, to pay one third of the income to the widow during her life, "or until January 1, 1901, should she so long live," or if she died before that day to the four children named, and the remaining two thirds of the income "until January 1, 1901," to the four children named and their issue, and "on the first day of January, 1901, or upon the full payment of all such mortgages should that occur at a later date, to pay over and convey the trust estate," in case the widow had died, to the four children named. The testator died February 8, 1894. On January 1, 1901, the widow had died, and a portion of the mortgages remained unpaid. On a bill for instructions, the question was raised, whether the trust created by the residuary clause was void, because the time for distribution might occur beyond the limit allowed by the rule against perpetuities. *Held*, that by the true construction of the clause no question of violation of the rule against perpetuities arose, as the trust terminated on January 1, 1901; that the provision that the distribution of the principal should take place on January 1, 1901, "or upon the full payment of all such mortgages should that occur at a later date" did not extend the period beyond the date

named, but meant that if on that date, when the accumulation of income to pay the mortgages ended, the mortgages had not been paid, they should then be paid out of the principal, and the balance distributed among the persons named.

BILL FOR INSTRUCTIONS, filed November 9, 1901, by the executors and trustees under the will of James M. Smith, late of Boston, who died on February 8, 1894.

The case came on to be heard before *Loring*, J., who reserved it upon the amended bill and answers for the consideration of the full court. The only question was whether the residuary clause provided for a time of distribution that might occur beyond the limit allowed by the rule against perpetuities. The provisions of this clause are stated by the court.

W. B. Farr, for the plaintiffs.

W. R. Sears, for the defendant Henderson.

J. Codman, guardian *ad litem*, *pro se*.

LORING, J. We are of opinion that, by the true construction of the will of James M. Smith, the accumulation of a quarter of the income of the residue of the estate and the duration of the equitable interests which accompany it, ceased on January 1, 1901; as that period ends within twenty-one years next after the death of the testator, the questions discussed by counsel as to the validity of the gifts over by reason of the rule against perpetuities do not arise.

The residuary clause of the will is substantially as follows: The residue is given to trustees (first) "in trust nevertheless, to take, hold, manage, invest, and reinvest the same until January 1, 1901," and "to pay over and distribute the net income" one quarter to the reduction or payment of any mortgages on the testator's real estate, one quarter to his widow, and one half to and among four of his children, who are named, and their issue; (second) "after all such mortgages shall have been fully paid off and discharged to distribute and pay over said net income semi-annually as follows: One third thereof to my said wife during her life, or until January 1, 1901, should she so long live. Should she die before January 1, 1901, this one third" to the four last named children and "two thirds thereof equally until January 1, 1901," among the four children aforesaid and their issue by right of representation. And finally "on the first day of January, 1901, or upon the full payment of all such mort-

gages should that occur at a later date, to pay over and convey the trust estate" in the event which has happened "to my four last named children and their issue by right of representation."

By the first two parts of the residuary clause of the will the accumulation is in terms restricted to the period ending on January 1, 1901; we do not think that the provision in the third part of that clause, that the distribution of the corpus of the trust shall take place on January 1, 1901, "or upon the full payment of all such mortgages should that occur at a later date," extends that period; this part of the residuary clause contemplates that on January 1, 1901, when the accumulation of income to pay mortgages ends, the mortgages may not have been paid, and in that event it is contemplated that the mortgages shall be then paid, that is to say, out of the corpus and the balance thereof distributed among the persons named.

It appears that an agreement has been made between the four children in question and their sister Jessie S. Henderson by which all five are to share equally in the residue.

The trustees should pay off the mortgage now subsisting on the real estate of the testator out of the principal of the trust fund and should distribute the balance thereof in accordance with the will and the agreement mentioned above.

So ordered.

CHARLES A. BUCKLAND *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 19, 1901. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Negligence, On railroad. *Evidence*, Prima facie case.

Assuming that in an action for negligence by a passenger against a railroad company, if the plaintiff shows that the car in which he was being carried was derailed, he may rest as having made out a prima facie case, yet if he goes on and shows by his witnesses the exact cause of the accident and discloses no negligence on the part of the defendant, he is not entitled to go to the jury.

A carrier of passengers is not responsible for hidden defects in a switching apparatus which could not be discovered by the most careful inspection.

A railroad company is not liable for an injury to a passenger from the derailment of a car caused by the breaking of a pin within a pipe of a switch holding a rod which moved a pair of frogs connected with the track, if the appliance was one in universal use and of the best kind and the switch had been carefully inspected at proper intervals.

TORT by a railway mail clerk in the employ of the United States, travelling on a pass called his "commission," against a railroad company for injuries caused by the derailment and overturning of a car of the defendant in which the plaintiff was lying asleep on a table. Writ dated November 17, 1898.

The case was tried in the Superior Court before *Richardson*, J. At the close of the evidence the defendant requested the judge to rule as follows: 1. Upon all the evidence the defendant is not liable. 2. The plaintiff was not a passenger within the legal significance of that term. 3. The plaintiff has failed to show that the defendant was negligent in any of the respects charged in his declaration. 4. There is no evidence of negligence in the operation of the switches, trains or railroad.

The judge refused to make these rulings, and gave instructions to the jury not now material. The jury returned a verdict for the plaintiff in the sum of $5,000; and the defendant alleged exceptions.

C. F. Choate, Jr., for the defendant.

M. Coggan, for the plaintiff, submitted a brief.

LATHROP, J. If we assume that the plaintiff was a passenger, and might have rested his case by showing that the car in which he was riding was derailed, thus making out a prima facie case, he did not choose to do so, but went on and showed by his own witnesses just how the accident happened. Unless, therefore, the evidence put in by him tended to show negligence on the part of the defendant, he was not entitled to go to the jury. *Winship* v. *New York, New Haven, & Hartford Railroad*, 170 Mass. 464.

The declaration alleges that the derailment of the train was caused by reason of the defective condition of the roadbed, tracks, switches, switching appliances, signals, signal connections, and ways and works of the defendant, and that the defective condition was caused by the negligence of the defendant.

An examination of the evidence fails to show any evidence of negligence on the part of the defendant. The accident was

caused by the breaking of a pin in a pipe, whereby a rod within the pipe, which moved a pair of frogs connected with the track upon which the train ran, was drawn apart, and so, although the proper motions were gone through with in the tower, the switch did not turn. The appliance which parted was one in universal use upon railroads throughout the country, and was the best known at the time. It was put in by the Union Switch and Signal Company, a company of high standing, which supplies goods to all railroads. Three experts for the plaintiff, of great experience, testified that there was no precedent for such an accident. The accident occurred soon after five o'clock in the morning, and the apparatus had worked all right two hours and twenty-five minutes before the accident. The evidence showed that the system of interlocking switches was carefully inspected about once a week, and it is difficult to see what more the defendant could have done. There was other evidence put in by the plaintiff which showed that there was no defect in any of the other particulars set forth in the declaration.

A carrier of passengers, while bound to use the utmost care consistent with the nature and extent of its business, is not responsible for hidden defects, which could not have been discovered by the most careful inspection. *Ingalls* v. *Bills*, 9 Met. 1. *Ladd* v. *New Bedford Railroad*, 119 Mass. 412. *Readhead* v. *Midland Railway*, L. R. 2 Q. B. 412, and L. R. 4 Q. B. 379.

A majority of the court is therefore of opinion that the first, third and fourth requests for instructions should have been given.

Exceptions sustained.

WINSLOW WARREN, trustee, *vs.* STREET COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. November 19, 1901. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, & HAMMOND, JJ.

Assessments, For benefits. *Statute. Municipal Corporations.*

Where a statute authorizing the extension and construction of a city street provides, that when about to do any work or make any purchase the estimated cost of which amounts to or exceeds $2,000, the superintendent of streets "shall, unless the mayor give a written authority to do otherwise, invite proposals therefor by advertisements" published in a certain way, an indorsement of approval by the mayor on the contract after it is made and a similar indorsement at that time on the request for permission to dispense with advertising for bids, are not a sufficient compliance with the statute.

If an assessment for betterments from the widening and extension of a city street is invalid, because a large part of the expense was incurred in violation of the provisions of the act authorizing it, it is immaterial whether or not the cost was greater than it would have been if the act had been complied with, and it also is immaterial that a sum considerably in excess of the amount of the betterment assessments was expended legally, as the assessment in such a case is for the benefit from the whole widening and extension and is not confined to the benefit from the money expended legally.

PETITION, filed October 29 and amended November 9, 1900, for a writ of certiorari to quash the proceedings of the mayor and street commissioners of the city of Boston in assessing betterments under St. 1894, c. 416, which authorized the street commissioners to extend, widen and construct Huntington Avenue from Copley Square in Boston to the town of Brookline.

The case came on to be heard before *Lathrop*, J., who, at the request of the parties, reserved it upon the petition, the amendment thereof, the answers, the return of the respondents and the agreed facts for the consideration of the full court.

M. Storey, (*C. Warren & G. Perry* with him,) for the petitioner.

A. J. Bailey, (*P. Nichols* with him,) for the respondents.

HAMMOND, J. This is a petition for a writ of certiorari to quash the proceedings of the street commissioners of the city of Boston, assessing a betterment tax on the estate of the peti-

tioner, on account of the widening and extension of Huntington Avenue.

The statutes authorizing the widening and extension provided that the work should be done with all reasonable dispatch by the superintendent of streets; and directed first, that it should all be done by contract, second, that the number of contracts should not exceed five, each to be subject to the approval of the mayor, and third, that when the superintendent was about to do any work or to make any purchase the estimated cost of which amounted to or exceeded $2,000, he should, unless the mayor gave a written authority to do otherwise, "invite proposals therefor by advertisements in not more than four daily newspapers published in said city, such advertisements to state the time and place for opening the proposals in answer to said advertisements," and reserving the right to reject any or all proposals. Sts. 1890, c. 418, § 4; 1891, c. 323, §§ 10, 12, 13; 1894, c. 416, § 4.

The order for the widening and extension was passed by the street commissioners and approved by the mayor January 5, 1895. It provided as a part of the work that a sewer should be constructed, and it determined and prescribed the kind of surface of the street, the height and width of the sidewalks, the location and size of the sewer, with the catch basins and manholes to be connected therewith, and the materials for the construction of the whole work, both street and sewer, all as required by St. 1891, c. 323, § 10.

With these statutes and this order before him as his authority and guide, the superintendent of streets in due time went to work. As to the sewer he divided it into six sections and made six contracts, one for each section each exceeding $2,000 in amount, the total amounting to more than $34,000. As to a part of the rest of the work, he made twelve contracts, every one of which, except two, was for more than $2,000, the total amounting to more than $120,000. The two above excepted were for more than $600 each, and one of them was not approved by the mayor. One of these twelve contracts, that of October 14, 1895, with O'Rourke and Company, amounting to more than $4,000, the estimated cost being over $2,000, was executed and the bond given without first getting the per-

mission of the mayor to dispense with advertising for bids, but the request for such permission and the contract were both some days afterward indorsed "Approved" by the mayor. This subsequent approval, however, was not a sufficient compliance with the statute. *Bowditch* v. *Boston*, 168 Mass. 239, 243. The same state of things existed as to the contract of April 11, 1896, with one Miller, amounting to $4,358. In the case of another one of these twelve, that of the Boston Bridge Works, amounting to $2,646, there was only a proposal in writing by the company accepted by the superintendent of streets. The mayor did not authorize dispensing with advertisements for bids nor approve of the contract in writing.

But this is not all nor nearly all. A large, if not the greater, part of the labor upon the avenue was done absolutely without any contract therefor whatever. The superintendent did the work, employing the regular workmen in the street department at the usual daily wages paid by the city. No estimate was made of the cost of this labor before it was performed, no advertisements for bids were made, nor were there any contracts made as to it. This course was taken in pursuance of communications from the superintendent to the mayor, of which the following under date of March 25, 1896, (omitting immaterial parts,) is a fair specimen: "I am about to excavate and sub-grade Huntington Avenue from Copley Square to the Brookline line, the estimated cost of which exceeds $2,000. This work can be done by my regular men, thereby keeping them employed instead of making a contract therefor, in which case no advertisement will be required. I therefore respectfully request your permission to dispense with such advertisement." These communications were marked "Approved" by the mayor.

The amount expended in this way for labor, engineering, inspecting, teaming, etc., in building the roadway, was more than $95,000, of which about $55,000 was spent in labor and about $37,000 in teaming. In the same way there was expended in superintendence, labor, advertising and teaming in building the sewers, in addition to the amount of the six contracts therefor above named, $17,500, and also $3,700, upon the second section of the sewer; and all without making any

estimate of the cost, without advertising for bids, or making any contract.

As to the materials used in the work, it appeared that it is the custom of the superintendent to make, at the beginning of the year, contracts as required by law for supplying the city with paving-blocks, edgestones, gravel, brick, flagging and lumber, and to use the same whenever required for the various pieces of street construction, charging the cost of the amount used as a part of the construction at the prices paid in such contracts; and it further appeared to be his custom to make leases of ledge lots for quarrying stone, and in some of these leases to make contracts for taking the stone from the quarry to the stone crushers owned and worked by the street department. The city by its employees crushes the stone and uses the crushed stone wherever required for the various pieces of street construction, charging the same as a part of the cost of such construction, at prices determined by the superintendent to be the actual cost thereof. It was further his custom to furnish to contractors such materials at the prices determined as aforesaid. This custom was followed in constructing this avenue, and such materials were furnished to the amount of $117,000, as to which no bids were advertised for or contracts made, except under this annual custom. The crushed stone so used, amounting in value to $32,000, was used by the approval of the mayor first obtained. Much of such material was furnished to the contractors by the department. It is thus seen that instead of advertising for bids to furnish paving-blocks, gravel, edgestones, flagging, brick, etc., for the construction of this avenue, and making contracts therefor at the time of construction requiring the contractors to include the item of materials in their contracts, the superintendent purchased all the materials in bulk at the beginning of the year, charged to the cost of this avenue the amount of materials used in its construction by him, at the price paid by the city therefor, as fixed by him. And as to the crushed stone, the price of this charge was such as the superintendent determined to be the cost. The total cost of constructing the avenue and sewer, as certified by the superintendent to the city auditor, is about $380,000, but the whole amount expended under the order of the commissioners, including land

damages, is $676,000, of which about $340,000 has been assessed upon those specially benefited, as a betterment tax. The petitioner's tax is about $800.

The contrast between what the statutes required and what was done is striking. The statute required the work to be done by contract; less than half the expense of construction was so done. The statute permitted only five contracts for the whole work; the superintendent made seventeen, and then not half the cost was covered by them. Work amounting to nearly $100,000 has been done by city laborers, and materials to the amount of more than $100,000 have been furnished without any contract whatever, except the annual contract above stated. The superintendent also has made contracts to the amount of several thousand dollars without advertising for proposals, and without antecedent written authority from the mayor to dispense with such advertisement, although after the contracts were made the mayor in most cases gave the authority and approved the contracts as made.

In a word, this great work, requiring the expenditure of about $675,000, of which about $380,000 has been expended under the supervision of the superintendent and the mayor, has been carried out so far as respects this last sum with a plain, direct and persistent disregard of the requirements of the law; and such disregard has not been confined to some insignificant or comparatively unimportant parts of the work, but it has been general and radical, and the whole has been affected by it. The requirements of the statute that the work shall be done by contract, that the number shall be limited to five, and that where the estimated cost of the thing to be contracted for equals or exceeds a certain sum there shall be a public advertisement for bids, are substantial, and were intended to give to the taxpayers the benefit of competition among those desiring to do the work, as well as the benefit of the difference between a wholesale and a retail price as applicable to it. They were further intended to prevent the practice of dividing a large work into various parts, so that instead of one contract there might be several contracts, each so small as not to call for advertisement; and all this was for the purpose of preventing those methods of extravagance, favoritism and corruption

which sometimes arise in the absence of some such statutory restriction, and which are too familiar to need any extended description.

It is no answer to say that it does not appear that the cost of the undertaking has been any greater than if done in exact compliance with the requirements of the statutes. Whether the cost be greater or less it is impossible for us to say. The Legislature prescribed a certain method of doing the work as a safeguard against fraud and abuse which, when committed, it would be difficult, if not impossible, to detect or remedy. The intention was to prevent evil rather than to attempt to detect and expose it when done. The taxpayer has the right to insist that these provisions which have been made for his protection shall be observed, at least so far as they affect him. The chance of detecting fraud and corruption liable to occur if the work is done in another way than that prescribed by law is no adequate substitute in the opinion of the law making power for the safeguards thus given him. Such a divergence from the law as is shown in this case is substantial, and the assessment, so far as it depends upon the lawfulness of these acts is invalid. *Bowditch* v. *Boston*, 168 Mass. 239, and cases cited.

It appears however that one of the items of the cost was the sum of $288,176, for land damages, and there is no contention that there was any illegality about this expenditure. It further appears that two of the contracts, namely, that of the Boston Asphalt Company for $46,000, and that of H. Gore and Company for $28,435, were legally made, unless the fact of there being more than five contracts rendered them illegal. These three items amount to $362,611, a sum considerably in excess of the amount of the betterment assessments, which is $338,878. The assessments were based upon the special benefit received from the widening and extension as a whole, and it is contended by the respondents that, inasmuch as the amount assessed is less than the amount legally expended, and no more than the benefit received, the assessment upon the petitioner is no more than his proportional share of the expense legally incurred; that the fact that some other expenditures were illegally made is immaterial as to him under the circumstances of this case, and that consequently the court in the exercise of its discretion

should decline to issue the writ of certiorari to quash the assessment.

But the difficulty with this position is that, as stated by the respondents, the assessment is for the benefit of the whole widening and extension. It is not confined to the benefit received only from money which was legally expended, but it includes the benefit received from that which was illegally expended. Upon this petition we cannot say what would have been the assessment, or what it should be if confined to the former class of expenditures, if indeed such an assessment can be legally made.

Writ of certiorari to issue.

THOMAS H. RUSSELL & another, trustees, *vs.* ELIZABETH B. BATES & others.

Suffolk. December 2, 1901. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Devise and Legacy, Construction. *Trust.*

A will provided that on the death of the testator's two children the property should be divided equally among his grandchildren. Then came the clause "That portion of my property when divided is to apply in trust for the benefit of my granddaughters then living," followed by a clause about grandsons. *Held*, that the ambiguous words "apply in trust," if they could be given any meaning, created at most a dry trust, under which the grandchildren were entitled to immediate distribution on the death of the testator's children.

BILL FOR INSTRUCTIONS, filed December 3 and amended December 10, 1900, by the trustees under the will of Joseph Ballister.

The case came on to be heard before *Lathrop*, J., who, at the request of the parties, reserved it for the consideration of the full court upon the bill and amendment thereof and the answers of the several defendants; such decree to be entered as law and justice might require.

T. H. Russell, for the plaintiffs.

W. Saulsbury, (of Wilmington, Delaware,) for the Russell granddaughters.

A. H. Russell, for the minor children of William E. Russell, deceased.

A. Lincoln, for other defendants.

LATHROP, J. Joseph Ballister, the testator, died on November 11, 1876, leaving a widow who was a second wife, and who had had no child, and two children by his first wife, namely, a married daughter, Mrs. Russell, and a married son, Joseph F. Ballister. Mrs. Russell then had living seven children, one of whom, a daughter, was then married and had two children. Joseph F. Ballister then had three unmarried daughters, and one married daughter, who had no child.

The will of the testator, after giving to his wife all his household furniture, pictures, books, wardrobe, jewelry and plate, gave the residue of his property to trustees, in trust to pay his wife one half the income of his property as collected for her life, and the other half of the income to be divided into two portions, one portion to be paid to his son, during his life, or to his heirs in case of his decease prior to the testator's wife; and the other portion to Mrs. Russell during her life, with a similar provision in case of her dying before the testator's wife. Then follow provisions for the disposition of the income in the case of the death of his wife, and the death of his son, and the death of Mrs. Russell.

The next provisions raise the questions which we are asked to consider.

"V. Upon the death of Sarah E. Russell and Joseph F. Ballister the trustees shall make an equal division of my property between the grandchildren then living. In case of any grandchild now living shall have died leaving issue, then the child or children of such deceased grandchild shall receive the portion that the deceased grandchild would have been entitled to if living, and that portion to be paid over to said child or children of the deceased grandchild. In this latter case the trustees shall pay over this portion of their trust to the representatives of the issue of such grandchild.

"VI. That portion of my property when divided is to apply in trust for the benefit of my granddaughters then living. That portion of my property when divided is to be paid over to my grandsons, so soon — each for himself, can show to the said

trustees that they have earned by their own industry the amount of their portion — until which to remain in trust."

The testator's widow, and his son and daughter are now dead, and Minetta J. Ballister, a daughter of Joseph F. Ballister, has recently died, unmarried. By her will she left her property in trust, the income to be paid to her mother for life, and the principal, upon her mother's death, to her then unmarried sisters. The question presented is what is the estate which this granddaughter took under the will of Joseph Ballister. It is contended on the one hand that the granddaughters of the testator took only a life estate, and on the death of any one of them her portion goes to the heirs of the testator by way of resulting trust, as there is no limitation over after her death. On the other hand, it is contended that at most only a dry trust was created, and that each granddaughter is entitled to receive her share absolutely free from any trust; and that consequently the deceased granddaughter had a right to dispose of her share by will, and that it should be paid to the person appointed administrator with the will annexed of her estate.

We are of opinion that the latter contention is right. It is clear from the fifth clause of the will, that on the death of Mrs. Russell and Joseph F. Ballister, the trustees were to make an equal division of the property between the grandchildren then living, the child or children of a deceased grandchild to take the share to which such grandchild would be entitled if living. The fifth clause concludes with the words: "In this latter case the trustees shall pay over this portion of their trust to the representatives of the issue of such grandchild." The intention of the testator so far is clear. Then follows the sixth clause, the first sentence of which is the occasion of the difficulty: "That portion of my property when divided is to apply in trust for the benefit of my granddaughters then living." The testator does not say that the share of each granddaughter is to remain in trust during her life, nor, if this is his meaning, what is to become of it in case of her death. The words used are ambiguous; but we are of opinion that there is no intestate property. All of the rest and residue of his property he left to his trustees, and the property left in trust for the grandchildren is to be divided equally between them. Both

of these clauses show the testator's intent to dispose of all his property.

Coming then to the ambiguous words "to apply in trust," if they can be given any meaning they create at most a simple or dry trust, the nature of which is not prescribed by the testator. "In such case the *cestui que trust* is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyances of the legal estate as he directs." Perry on Trusts, (5th ed.) § 520. Lewin on Trusts, (10th ed.) 16. In *Denfield, petitioner*, 156 Mass. 265, 269, a bequest was made of $3,000 to the testator's nephew and adopted son, "in trust to my executors," and it was held that the beneficiary took the sum absolutely, free from any trust. See also *Fay* v. *Phipps*, 10 Met. 341.

The trustees are therefore instructed to pay the portion of the trust estate which belonged to Minetta J. Ballister in her lifetime to the administrator with the will annexed of her estate.

So ordered.

NATHAN WEINER *vs.* GEORGE L. WENTWORTH & another.

Suffolk. December 4, 1901. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Practice, Criminal, Appeal.

A petition for a writ of mandamus to order the judge and clerk of a municipal court to allow and enter an appeal of the petitioner from a judgment on which he was sentenced to imprisonment for two months in a house of correction will not be dismissed for the reason that the petitioner has served his sentence.

An appeal to the Superior Court by a person convicted of an offence and sentenced to imprisonment by a district or police court, including the Municipal Court of the City of Boston, taken after the mittimus has been issued and the prisoner has been removed from the court, is taken too late.

PETITION, filed June 28, 1901, for a writ of mandamus to order the judge and clerk of the Municipal Court of the City of Boston to allow and enter the appeal of the defendant in a criminal case.

The case was heard by *Hammond*, J. It appeared, that the petitioner on June 27, 1901, was tried in the Municipal Court of the City of Boston on a charge of non-support of his wife and minor children, that he was found guilty and sentenced to serve a term of two months at the house of correction at Deer Island, that a mittimus warrant was issued directed to the jailer at that house of correction; and that between 12 M. and 2 P. M. on the same day and before the adjournment of the court, the defendant's counsel claimed an appeal, which was refused by the judge of the court because the mittimus warrant had been issued and the prisoner was on his way to serve his sentence. The justice denied the petition; and the defendant appealed.

On November 20, 1901, the counsel for the respondents, before the full court, moved that the petition be dismissed on the ground that the petitioner had served his sentence and there was no occasion for the order. On November 21, 1901, the motion was denied.

M. I-F. Reuben, for the petitioner.

J. D. McLaughlin, Assistant District Attorney, for the respondents, submitted a brief.

LATHROP, J. If we assume, without deciding, that a petition for a writ of mandamus is the appropriate proceeding in a case like this, we are of opinion that the ruling of the single justice of this court denying the petition was right.

The St. of 1893, c. 396, which revises and consolidates the laws relating to district and police courts, in § 47, provides: "Every person convicted of an offence before a district or police court may appeal from the sentence to the Superior Court then next to be held in the county. The appellant shall be committed to abide the sentence of said court until he recognizes to the Commonwealth, in such reasonable sum and with such surety or sureties as the court requires, with condition to appear at the court appealed to," etc.

The St. of 1894, c. 431, § 1, makes all the provisions of the St. of 1893, c. 396, apply to all police, district and municipal courts in the county of Suffolk, except the Municipal Court of the City of Boston. But by § 2 of said chapter it is provided that the Municipal Court of the City of Boston shall have all of the civil and criminal jurisdiction conferred upon police and district

courts by the provisions of §§ 12–53, both inclusive, of the St. of 1893, c. 396, in addition to the present jurisdiction of that court. Section 47 of the act above cited therefore applies. See also Pub. Sts. c. 154, §§ 39, 43. By § 62 of the same chapter, "The court shall be held for criminal business daily, except on Sundays and legal holidays, at nine o'clock in the forenoon."

The section in regard to an appeal does not state when the appeal is to be taken, and the question in this case is whether a person convicted has the entire day in which to take his appeal, or whether it should be taken before he is committed to serve his sentence.

The question of the seasonableness of the appeal is to be determined not only by the duration of the sitting of the court but by other provisions of the statutes. By the Pub. Sts. c. 215, § 25, "When a person convicted of an offence is sentenced to pay a fine or costs or be imprisoned, . . . the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or to some officer in court, a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be a sufficient authority for the officer to execute such sentence, and he shall execute it accordingly."

On the authority of the statute just cited, it was said in *Commonwealth* v. *Hayes*, 170 Mass. 16, "An ordinary sentence of fine or imprisonment imports that it is to be carried into execution forthwith." It is also to be observed that by the St. of 1893, c. 396, § 48, upon an appeal the court has the same authority to bind by recognizances the witnesses in such a case as it has by the Pub. Sts. c. 212, when a prisoner is admitted to bail or committed. These provisions are contained in §§ 36–40, and give the court power to bind by a recognizance the principal witnesses against the prisoner to appear and testify at the next court having cognizance of the offence.

If the person convicted has the entire day in which to take his appeal, this provision of statute would be rendered of no avail, for the court has no authority to detain the witnesses until it is determined whether an appeal is to be taken.

These considerations have led us to the conclusion that the

appeal in this case, taken after the mittimus had been issued and the prisoner had been removed from the court and had begun to serve his sentence, was taken too late. See *State* v. *Epperson*, 4 Mo. 90.

Exceptions overruled.

EDWARD T. BACON, executor, *vs.* CHARLES N. BACON.

Middlesex. December 4, 1901. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Will, Undue influence. *Evidence*, Burden of proof.

Where a will is contested on the grounds of unsoundness of mind and undue influence the burden is on the executor to prove soundness of mind and on the contestant to prove undue influence.

Some influence may be exercised upon a testator by a devisee or legatee which is not undue.

APPEAL from a decree of the Probate Court for the county of Middlesex allowing the will and codicil of Sarah A. Bacon.

The case came up on exceptions taken in the Superior Court to the refusal of *Sherman*, J., to make certain rulings in regard to the issues of fact tried in that court.

G. L. Mayberry & F. L. Washburn, for the appellant.

A. F. Butterworth, for the executor.

LATHROP, J. This is an appeal from a decree of the Probate Court, admitting to probate two instruments purporting to be the will and codicil of Sarah A. Bacon. The usual issues were framed by a single justice of this court, and were sent to the Superior Court for trial. The case was there tried, and the jury answered the issues so as to sustain both the will and codicil; and the case is now before us on the appellant's exceptions to the refusal of the judge presiding at the trial in the Superior Court to give three rulings requested.

The testatrix died in April, 1900, and was then eighty-three years old. The will was executed on September 28, 1899, and the codicil on October 6, 1899. In 1894, Mrs. Bacon had made another will, by which she gave all her real estate in Winchester to her husband John H., and the residue of her estate in trust,

the income to be divided, during their lives, between John H. and her son Edward T. Bacon. In August, 1899, her husband died, and by the will in question, made the following month, she gave her real estate in Winchester to her son Edward T. Bacon, and the residue of the estate, after certain specific bequests, to him as trustee to divide the income between himself and his brother Alonzo P. Bacon during their lives and the life of the survivor, with remainder over to her daughter, Syrena L. Fowler. The codicil merely changed some small bequests.

There was evidence that Edward and Alonzo had spent considerable sums of money for the support and comfort of their father and mother, and that in 1884 Edward, at the request of his parents, returned from California, where he was living, and lived with and took care of them during their lives. Before the will was executed, Alonzo and Edward had lost most of their property. Charles N. Bacon, who contested the will and codicil, was a man of considerable means. It did not appear that he had given his father or mother money, except to make them a yearly present of ten dollars. He had done some ploughing and work of that kind for them, and at their golden wedding had sent them a tub of butter. He lived within a few minutes' walk of his mother's house, but did not see her often, and did not call upon her during the last five days of her illness.

There was evidence that shortly before making the will the testatrix had stated to various persons that she had to rely wholly upon Edward, and depended upon him in all her business transactions, and that she did not know what she would do without him as he was both son and daughter to her.

Edward T. Bacon testified that he and his mother talked over the making of the will, and that, using the will of 1894 as a form to go by, he wrote a memorandum of the provisions of the will in question, and took it to an attorney in Boston, who prepared a draft of the will, which the witness took home; that afterwards some changes were made in it, but he could not say what the changes were, nor could he remember what his mother said to him with regard to the provisions of the will, nor designate any particular change that she authorized to be made. He further testified that, after the death of his father, his mother said to him that some changes ought now to be made in her

will; that in making the memorandum above stated he followed his mother's dictation; that after the first draft of the will was made he took it home and read it to his mother, who directed the changes to be made.

The testimony as to the soundness of mind of the testatrix was what is often found in a case like this. That for the contestant was to the effect that she had been ill from December, 1898, to the last of February, 1899; and that during this time and afterwards there was some impairment of her mental faculties; that after her illness various persons, who had known her intimately for years, called upon her and found her unable to recognize or remember them. For the executor the attending physicians testified that she was of sound mind. Several witnesses testified that they often called upon her, and they always found her mind alert, and that she discussed matters of general interest; that she frequently wrote letters with her own hand; and several of these letters written during the fall when the will and codicil were made were put in evidence.

On this state of the evidence, the contestant made three requests for instructions. The first one was not discussed on the brief, nor insisted upon, and we regard it as waived. The second and third were as follows:

2. "If the jury find that Edward T. Bacon exercised any influence over the testatrix which tended to induce her to make this will, the burden of proof is on the party setting up the will to satisfy the jury by a fair preponderance of the evidence that she had sufficient mental capacity to enable her to resist that influence.

3. "If the jury should find that the mental capacity of the testatrix was such that she was capable of executing a will, if left to herself and free from outside influences, and should also find that some influence was brought to bear upon her by her son Edward in favor of this will or certain parts of it, but that such influence would not be sufficient to control a mind in its normal condition, so that neither the loss of mental capacity nor the influence exerted over her by Edward would alone be sufficient to render the will invalid, and yet the jury should find that, taking the two together, the act of the testatrix in making the will was not her free and voluntary act, then they would be

warranted in finding that the will was executed under undue influence."

These requests were not given in terms, but the presiding judge charged the jury fully on the question of soundness of mind, reading from the opinion of Chief Justice Cockburn, in *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, 567, where are cited several cases from courts in this country; and also reading to the jury the charge of Mr. Justice Allen in *Whitney* v. *Twombly*, 136 Mass. 145, 146, (which was held by the full court to be accurate and sufficient,) and stating the law on the subject in his own language fully and accurately. The same is true of what was said in the charge on the question of undue influence. As bearing upon the requests for instructions, it is necessary to refer to the concluding portion of the charge: "You are the judges to determine these two questions submitted here: Whether she was capable of making a will, and whether she made such a will as she wanted to make? that is the question — was that her will or was that Edward's? If she had not mind enough to make a will, of course, your finding will settle the controversy. If she had, then was that mind, whatever its strength, so controlled by Edward that an entirely different will was made from what she would have made? You may consider also as bearing upon that question the will of 1894. You have heard the will of 1894 read and know what it is." The judge further instructed the jury that the burden of proof was on the executor on the issue of testamentary capacity; and upon the appellant upon the question of undue influence. No exception was taken to any part of the charge.

Passing then to a consideration of the second and third requests, we are of opinion that they were properly refused. The second request, if given, would have tended to mislead the jury. The burden of proof was on the executor to prove soundness of mind, and on the contestant to prove undue influence, and so the jury were instructed. While there is some conflict of authorities in other jurisdictions on the question of the burden of proof, where undue influence is alleged, there is none in this Commonwealth. *Baldwin* v. *Parker*, 99 Mass. 79, 87. *McKeone* v. *Barnes*, 108 Mass. 344. *Davis* v. *Davis*, 123 Mass. 590, 598. The request is also misleading in using the language "any in-

fluence which tended to induce her to make this will." A will is not to be set aside because some influence is used by a devisee or legatee; but undue influence must be shown to accomplish this result. *Hall* v. *Hall*, L. R. 1 P. & D. 481. *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462. *Wingrove* v. *Wingrove*, 11 P. D. 81. *Boyse* v. *Rossborough*, 6 H. L. Cas. 2, 48, 49.

We are further of opinion that the third request was properly refused. It disregards the difference between influence and undue influence. It says in effect that if the jury should find that the testatrix was of sound mind and no undue influence was used, they might find that undue influence was used. It is undoubtedly true that a person may be of sufficient capacity to make a will, if let alone and not unduly influenced, and yet not of sufficient capacity if unduly influenced. And it is also true that in determining whether influence is lawful or unlawful regard is to be had to the condition of mind and body of the person upon whom the influence is exerted. *Griffith* v. *Diffenderffer*, 50 Md. 466, 480. See also *Mooney* v. *Olsen*, 22 Kans. 69. But this was not the case put by the request. So far as the request relates to the requirement that the will and codicil should be the free and voluntary act of the testatrix, it is fully covered by the portion of the charge which we have cited.

Exceptions overruled.

CHARLES E. GILES, JR. *vs.* FRED N. DUNBAR & another.

Suffolk. December 5, 1901. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Equity Jurisdiction, Injunction, Specific Performance.

A bill, to restrain the defendant from buying milk for use in his business from any person other than the plaintiff, alleged, that the plaintiff had an exclusive contract with the defendant to sell him the milk that he should require in his business and that the plaintiff paid $100 as a consideration for the contract. There was no allegation as to the length of time covered by the contract or as to the price or the amount of milk to be delivered or the time and place of delivery. On demurrer, *held*, that the contract as set forth was too vague and indefinite to enforce by injunction.

BILL IN EQUITY, filed February 19, 1901, to restrain the defendant Dunbar from buying milk for use in his business from any person other than the plaintiff.

The first paragraph of the bill was as follows: "1. On or about the first day of January, A. D. 1901, the plaintiff was possessed of a certain valuable interest and right of property, viz.: the exclusive right, by virtue of a contract between himself and the defendant Dunbar, to sell the said Dunbar milk that the said Dunbar should use or require in his business."

The eleventh paragraph was as follows: "11. The plaintiff, as consideration for the exclusive right to supply the defendant Dunbar with milk, as set out in paragraph one, paid said Dunbar the sum of one hundred dollars ($100)." There was no further statement of the contract.

The defendants demurred, and as causes of demurrer among others alleged: 1. While the plaintiff bases his right to equitable relief upon a contract referred to in paragraph one of the bill, there is no allegation therein of the duration of the contract or statement that the contract migh not be and was not properly and legally terminated by the defendants. 2. While the bill alleges in substance that the plaintiff was possessed of an exclusive right to supply the defendant Dunbar with milk that he should require in his business, there is no allegation that the defendant Dunbar requires any milk in his business in any way whatsoever, and therefore his neglect and refusal to receive any milk is not in contravention of the terms of any contract which is set forth.

The Superior Court sustained the demurrer and dismissed the bill; and the plaintiff appealed.

W. A. Buie, for the plaintiff.

H. W. Ogden, for the defendants.

LATHROP, J. We are of opinion that the decree of the court below sustaining the demurrer and dismissing the bill was right. The bill sets out that the plaintiff has an exclusive contract with the defendant Dunbar to sell to him the milk that he should use or require in his business, and that he paid $100 as a consideration for the contract; and this is all so far as the contract is concerned. The relief sought against Dunbar is that he be restrained from buying milk for use in his business

from any person other than the plaintiff during the existence of said contract. There is nothing stated as to the length of time that the contract is to continue, the price at which the milk is sold, the amount to be delivered or the time and place of delivery. While the relief sought is negative in its character, we do not think that it should be granted, where we would not enforce the contract specifically. And we are of opinion that enough does not appear in this case to show that the court ought to grant specific performance. *Boston & Maine Railroad* v. *Babcock*, 3 Cush. 228. *Pray* v. *Clark*, 113 Mass. 283. *Lynes* v. *Hayden*, 119 Mass. 482. See also *Ashcroft* v. *Butterworth*, 136 Mass. 511.

Decree affirmed.

MICHAEL R. CULBERT *vs.* FRED A. HALL & others.

Suffolk. December 9, 1901. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Equity Pleading and Practice, Refusal to frame issues. *Discretion of Court.*

A party to a suit in equity asking this court to revise the discretion of a judge of the Superior Court in refusing to frame issues for a jury in order to prevail must show that the issues of fact could be more satisfactorily tried by a jury than by the judge and that the judge in refusing to frame issues did not exercise his discretion rightly.

In a suit in equity the answers were filed June 12. Two days later the judge ordered the pleadings completed forthwith and the cause set down for hearing on the merits for the week beginning June 18. The plaintiff filed replications on July 5, and on August 8 filed a motion for the framing of issues for a jury. The motion was denied. *Held*, that the delay in making the motion alone was enough to justify the denial.

LATHROP, J. This is a bill in equity to remove a cloud upon the title to a parcel of land in Nantucket. It does not appear to be brought under the St. of 1893, c. 340, but under the general jurisdiction in equity which the Superior Court has had since the St. of 1883, c. 223. See *Clouston* v. *Shearer*, 99 Mass. 209; *Smith* v. *Smith*, 150 Mass. 73.

The plaintiff's title is derived from a sale in pursuance of a levy of execution upon the land, and a sheriff's deed dated

December 28, 1899. The land was attached on mesne process on August 1, 1898, as the property of one Chase. The alleged cloud upon the title was a mortgage of the land from Chase to the first named defendant, dated October 14, 1891, and purporting to secure a debt of $5,000. The question raised by the pleadings was whether this mortgage was without consideration, and made to cover and conceal the property from the creditors of Chase.

The case comes before us upon an appeal from an interlocutory decree of the Superior Court denying a motion of the plaintiff that issues be framed for a jury. The case was afterwards heard upon its merits in the Superior Court, and a decree entered dismissing the bill.

The plaintiff concedes that he has no constitutional right to have issues framed for a jury, and that his application must be addressed to the discretion of the court. In this he is right. The matter has been considered so lately by the court in *Parker* v. *Simpson*, 180 Mass. 334, that it needs no further discussion. The judge of the Superior Court in his discretion refused to grant issues. We, no doubt, have the power to revise his discretion. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45. *Harris* v. *Mackintosh*, 133 Mass. 228. But the language of the court in *Ross* v. *New England Ins. Co.* 120 Mass. 113, 117, which was a bill in equity to reform a policy of insurance, is applicable here. It was there said by Chief Justice Gray: "But in the present case it is the plaintiff who moves for an issue to a jury; and his motion only is before us, without any evidence that his suggestion of mistake in the written contract between the parties has any foundation, or any circumstances indicating that the matter can be more satisfactorily tried by a jury than by the court. He therefore fails to show any reason why a trial by jury should be directed upon the issues tendered."

The case before us comes also within the case of *Bourke* v. *Callanan*, 160 Mass. 195. The answers in the present case were filed on June 12, 1900. Two days afterwards the judge ordered the pleadings to be completed forthwith and the cause set down for hearing on the merits for the week beginning June 18. The replications were not filed until July 5, and the

motion for issues was not filed until August 8. It was denied on September 21. The final decree dismissing the bill was entered on March 14, 1901. It was said by Mr. Justice Holmes in *Bourke* v. *Callanan*, "The plaintiff's appeal from the order overruling his motion to frame issues for a jury cannot prevail. The motion was addressed to the discretion of the court, *Ross* v. *New England Ins. Co.* 120 Mass. 113, 117, and we cannot say that the discretion was not exercised rightly. The delay in making the motion is enough to justify the order, without more. The case had been marked for hearing six weeks, and the juries had been excused before the motion was made. The plaintiff's omission to file his replication does not better his case. *Stratton* v. *Hernon*, 154 Mass. 310, 312."

We find nothing in the case before us to indicate that the issue of fact could be more satisfactorily tried by a jury than by the court, nor anything to show that the judge did not exercise his discretion rightly; and the facts in regard to the delay in making the motion are very similar to those in the case we have just cited.

The order must therefore be

Decree affirmed.

J. W. Titus, for the plaintiff.

W. B. French, for the defendant.

CATHERINE PEABODY *vs.* WILLIAM H. FELLOWS.

Essex. January 3, 1902. — March 1, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Contract, Implied, Performance.

The plaintiff conveyed certain land to the defendant under an oral agreement, by which the defendant agreed to pay off a certain mortgage thereon, and, on the plaintiff paying him the amount paid on the mortgage and $150, to reconvey the land to the plaintiff. An agreement to reconvey was drawn up and the defendant said he was satisfied with it, but, after he had obtained the deed from the plaintiff, he refused to sign the agreement and did not offer to sign any paper, and sold and conveyed the land to the mortgagee. *Held*, that these facts would

warrant a jury in finding, that the defendant deliberately broke his promise to sign the agreement on the ground that it was not enforceable, and, if so, a right of action at once accrued to the plaintiff to recover the value of the property he had parted with. If the right of action did not accrue until the defendant sold the land, it would be a question for the jury whether the plaintiff had failed in the performance of any conditions precedent before that time. After the sale, the plaintiff was not obliged to do anything.

LATHROP, J. This is an action of contract to recover the value of a certain parcel of land, which had been conveyed to the defendant by the plaintiff under his oral promise to reconvey the same. The case has been already before us on demurrer to the declaration, and the demurrer was overruled. *Peabody* v. *Fellows*, 177 Mass. 290. It was then said by the court: "The principle of law on which the action is founded is, that if one has received money or other property as the consideration of an executory contract which cannot be enforced by reason of the statute of frauds, and if he then refuses to perform the contract, he is liable to the other party under an implied promise to return the money or pay for the property."

The case was then tried in the Superior Court, and a verdict for the plaintiff was rendered. It is now before us on the defendant's exceptions to the refusal of the presiding judge to give the following requests for rulings.

"1. Under any agreement made between the parties, the payment by the plaintiff to the defendant of the sum due him from the plaintiff, was a condition precedent to the reconveyance of the real estate in question, and that, until such payment was made or tendered by the plaintiff to the defendant, the plaintiff had no legal claim to a reconveyance of said real estate, and, consequently, could claim no damages for a failure to reconvey.

"2. The precedent conditions of the reconveyance of said real estate were that the defendant should sign an agreement, and that the plaintiff should pay a sum of money to the defendant. If there was a failure on the part of both defendant and plaintiff, the plaintiff cannot recover damages for failure to reconvey.

"3. The original agreement of the defendant was to sign an agreement to reconvey, to be drawn by the plaintiff's counsel. An agreement was drawn by said counsel, who promised to make changes in it, if desired by the defendant. Upon receipt

of the agreement by the defendant, he immediately objected to it, as it was, and it was the duty of the plaintiff to make and offer to the defendant a new agreement embodying said changes. This the plaintiff failed to do, and the defendant, after waiting upwards of four months, was at liberty to convey the land to another."

It appeared in evidence that the property was conveyed by the plaintiff to the defendant on November 8, 1898, and that the defendant conveyed it on March 17, 1899, to one Holman, who held a mortgage on the property, dated October 29, 1897. There was also evidence that the defendant agreed to assume the mortgage if the plaintiff would give a deed of the house, and to reconvey it. The plaintiff then owed the defendant $150. There was also evidence that, after the agreement to reconvey was drawn up and the defendant said he was satisfied with it, he refused to sign it, and afterwards obtained the deed from the plaintiff's husband, under a promise to sign the agreement and pay the mortgage, and that he did neither, but had the deed recorded and afterwards sold the property as above stated. There was conflicting evidence as to the form of the agreement to be signed by the defendant, but it was in evidence that after the defendant obtained the deed he did not offer to sign any paper.

The pleadings are set out in full in the case as reported in 177 Mass. 290; but the requests asked for do not call for a ruling upon the pleadings and evidence. The plaintiff does not seek to enforce the terms of the agreement that was to have been signed by the defendant, but to recover the value of the estate, less the amount of the mortgage, and the sum of $150 due from her to the defendant.

The evidence would warrant the jury in finding that the defendant deliberately broke his promise to sign the agreement on the ground that it was not enforceable. If so, a right of action at once accrued to the plaintiff to recover the value of the property which she had parted with.

In this view the instructions requested are inapplicable to the issues in the case, and were rightly refused. If, however, the right of action did not accrue until the defendant sold the land, it would be a question for the jury whether the plaintiff,

if there were any conditions precedent to be performed on her part, had waited an unreasonable time before performing them. After the sale by the defendant she certainly was not called on to do anything. As the requests omit all reference to this element, they were rightly refused.

Exceptions overruled.

J. F. Quinn & W. H. Twohig, for the plaintiff.

F. E. Farnham, for the defendant.

ZINA H. BLACKMER *vs.* MERRICK E. HILDRETH & others.

Suffolk. January 10, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Elections, Requirements as to nomination papers.

The requirements of St. 1898, c. 548, §§ 141, 142, 145, as to the time of filing nomination papers and the certificates thereon, although binding on the officers whose duty it is to prepare and pass upon the official ballot, do not invalidate ballots cast for a candidate nominated by papers filed too late and not properly certified.

PETITION, filed August 13, 1901, for a writ of mandamus to be issued to the selectmen of Petersham commanding them to receive the petitioner as one of their board and commanding Edwin C. Dexter to refrain from acting as a member of that board.

The case was heard by *Barker*, J., who ruled that the informalities in the nomination papers of Edwin C. Dexter would not invalidate his election, and that the petitioner, by making no protest after his signing the certificate on the nomination papers on May 7, 1901, and by participation in the meeting at which Dexter was elected, and by acquiescence in its results, was precluded from maintaining his present petition.

The justice ordered the petition dismissed; and the petitioner alleged exceptions.

J. W. Corcoran & W. B. Sullivan, for the petitioner.

J. B. Warner & A. H. Brooks, for the respondents.

HAMMOND, J. St. 1898, c. 548, requires that a nomination paper in the case of an election like this shall be filed as early as the seventh day preceding the election (§ 145), and that at the time it is filed it shall have thereon the certificate of the registrars of voters as to the number of signatures which are names of qualified voters and also shall have annexed to it an oath made by one of the signers thereto verifying the truth of the statements therein contained, with the certificate of the person before whom the oath is taken that he is satisfied that the person to whom the oath is administered is the person signing the paper. §§ 141, 142.

In the case before us the nomination paper was filed two days late, and a certificate of the registrars was placed thereon and the oath of one of the signers of the paper and certificate respecting it were annexed thereto after the paper was filed but not before the official ballot was made up. One of the questions is whether the election shall be declared invalid on account of these irregularities.

The justice found as a fact that all parties including the town clerk and the registrars, one of whom was the petitioner, acted without fraud and in good faith. Dexter's name was placed upon the official ballot and he received at the election a majority of the votes.

Under our system of elections the voter receives at the polls from the election officers an official ballot, of which he does not know and is not expected to know anything except what appears upon its face; and as a rule it is impossible, as in this case, by an inspection of the ballot to ascertain whether or not there has been any irregularity in the preparation of it. He takes this ballot, sees upon it the names of the candidates, and, having expressed thereon in due form his choice, deposits it in the ballot box. Thus he duly expresses his will upon the paper prepared and handed to him by the officers of the law appointed for that purpose. All this he does in good faith. All this the voters at the election in question did in good faith, and the result was that Dexter received a clear majority of the votes.

It is contended, however, by the petitioner, that the provisions of the election law above recited are mandatory and that as a necessary result the election of Dexter was void. On the

contrary the respondents contend that in this case there was no such non-compliance with these provisions as to render the election void.

The statute in question deals with the whole subject of elections, from the qualifications of voters to the final ascertainment of their choice. In order that the official ballot may be properly prepared, it provides the manner in which caucus and other nomination papers shall be made up, prescribing with considerable minuteness the details, and it fixes the time within which the papers shall be presented for the ballot as well as the time within which objections to any such paper may be made. §§ 139–146, 148–152. It further provides for the creation of a board charged with the duty of settling all disputed questions of fact arising upon such objections, and "the decision of a majority of the members thereof shall be final." §§ 147, 153. It further provides that nomination papers filed and in apparent conformity with law shall be held valid unless objections are seasonably made thereto. § 146. In the case of towns, the town clerk having before him the undisputed papers and the decision of the proper tribunal upon those to which objection is made prepares the official ballot in accordance therewith, and this is the ballot which the voter finds waiting for him at the polls. It contains the officially declared result of all these preliminary proceedings, but, as we have said before, there is nothing by which the voter can judge whether or not all these proceedings have been regular. As stated by Andrews, C. J., in *People* v. *Wood*, 148 N. Y. 142, 147, "The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors and not to defeat them." This must be borne in mind in the construction of such statutes, and the presumption is that they are enacted to prevent fraud and to secure freedom of choice, and not by technical obstructions to make the right of voting insecure. The provisions above recited with reference to the preparation of the ballot are plainly limited and confined to that purpose. They are binding upon the officers for whose guidance and direction they are needed. If it be seasonably objected to a nomination paper that it was not filed within the time required by § 145, or that the provisions of §§ 141 and 142

have not been complied with, it is the duty of the proper board to inquire into and settle the question, and to sustain the objection, if found to be true, and reject the paper. So far as respects their decision these provisions are mandatory. When the decision is made it is final, and a ballot made up in accordance therewith is not thereby made illegal. And in the same way the action of the town clerk, at least in the absence of fraud and corruption, as to the papers to which no objection is made, must be regarded as final so far as respects the ballot which he prepares.

But with the preparation of the ballot the influence of these provisions end. If there be irregularities like those in this case they do not accompany the ballot and taint it in the hands of the voter. This view of the statute gives due weight and scope to the provisions in question, and preserves the sanctity of the right of suffrage and its free and honest exercise. To hold otherwise would be to lose sight of the purpose for which these provisions were made, namely, to provide the method and time for the preparation of the ballot, and would subject our elections to intolerable and perplexing technicalities in no way material to the substantial merits of the controversy or to the freedom and result of the action of the voters. Its natural tendency would be to thwart rather than to secure a true expression of the popular will.

We are aware that the courts of England and Australia are inclined to extend the operation of provisions similar to those in question further than is done in this case, but an examination of the English statute would seem to show that it expressly reserves to the courts a supervision over some of the decisions of the officers respecting the preparation of the ballots, upon a petition questioning the election after it has taken place. St. 38 & 39 Vict. c. 40, § 1. *Regina* v. *Parkinson*, L. R. 3 Q. B. 11. *Mather* v. *Brown*, L. R. 1 C. P. D. 596. *Howes* v. *Turner*, L. R. 1 C. P. D. 670. *Monks* v. *Jackson*, L. R. 1 C. P. D. 683. *Regina* v. *Miller*, 1 Australian Jur. 156.

But, whether that be so or not, we are not inclined to adopt a construction which is so manifestly opposed to the general spirit of our laws and the freedom of our elections as that contended for by the plaintiff.

For some decisions in other States in accordance with the views herein expressed, see *People* v. *Wood*, *ubi supra*, *Stackpole* v. *Hallahan*, 16 Mont. 40, and the cases therein cited, overruling in substance the previous case of *Price* v. *Lush*, 10 Mont. 61.

The ruling that the informalities in the nomination paper of the respondent Dexter did not invalidate the election was correct. It becomes unnecessary to consider the other grounds of defence.

Exceptions overruled.

EDWARD S. BRADFORD *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. January 13, 14, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Tide water, Compensation for displacement. *Statute*, Construction.

Semble, that the provisions of Pub. Sts. c. 19, § 14, requiring compensation for tide water displaced by structures or filling below high water mark, apply only to structures voluntarily erected under some authority or license, *but*, however that may be, those provisions are not applicable to the displacement of tide water by the Old Colony Railroad Company in performing its part of the requirements of St. 1897, c. 519, providing for the abolition of the grade crossing of Dorchester Avenue in Boston and the railroad of that company.

CONTRACT by the treasurer of the Commonwealth under Pub. Sts. c. 19, § 15, to collect an assessment of $17,250 made by the harbor and land commissioners for tide water displaced by the Old Colony Railroad Company in filling flats and erecting structures in South Bay in Boston Harbor pursuant to a decree of the Superior Court confirming a report of commissioners appointed under St. 1897, c. 519, providing for the abolition of the grade crossing of Dorchester Avenue in Boston and the road of the defendant. Writ dated November 9, 1901.

The case was heard by *Barker*, J., upon the defendant's demurrer to the declaration. It was admitted by the plaintiff, that no notice was given to the defendant by the commissioners that it might appear and be heard upon the matter of the

assessment, and that the commissioners do not give such notice to parties to be assessed by them for displacement of tide water. The justice reserved the case for the consideration of the full court upon the demurrer and this admission.

F. H. Nash, Assistant Attorney General, for the plaintiff.

J. H. Benton, Jr., for the defendant.

HAMMOND, J. A careful study of the statutes providing for compensation for displacement of tide water in Boston harbor by structures would seem to indicate that they apply only to structures voluntarily erected under some authority or license. Sts. 1866, c. 149, § 4; 1869, c. 432; 1872, c. 236; 1874, cc. 284, 347; 1878, c. 74. Pub. Sts. c. 19, § 14. Such a construction seems to follow from the language of the statutes and from the peculiar nature of the manner in which compensation may be exacted.

But whether that be so or not, we are of opinion that the provisions of Pub. Sts. c. 19, § 14, are not applicable to the displacement caused by the work done under St. 1897, c. 519. Section 1 of this last statute, after reciting that commissioners had theretofore been "appointed by the superior court . . . upon the petition of the mayor and aldermen of the city of Boston to consider the abolition of the grade crossing of Dorchester avenue and the railroad" of the defendant company, provided that they should "prescribe the details for the abolition" of the crossing by re-locating the part of the railroad and by changing the grade of certain streets, "all substantially as shown upon" a certain plan therein particularly described.

Section 2 provided that the defendant should construct the part of the railroad so re-located, and that the city of Boston should raise the grade of the streets, all as thus prescribed, and that with certain exceptions, not here material, the cost of the work should be paid as follows, namely, twenty per cent by the Commonwealth, fifteen per cent by the city of Boston, and the rest by the defendant.

It appears from the declaration in this case that the details were prescribed by the commissioners as thus required; that their report was confirmed by a decree of the court, and that, pursuant to the decree, the defendant erected structures in tide water below high water mark, and thereby caused the displace-

ment of tide water for which compensation is sought in this action.

It thus appears that the work was done in accordance with an express command of the Legislature and in the interest of the public security and convenience. It was a necessary result that tide water should be displaced. The cost of the work was to be paid by the State, the city and the defendant, in the manner specifically set forth. To hold that compensation for displacement of tide water is a part of the cost is to make the Commonwealth ultimately liable for twenty per cent thereof. To hold that it is not to be regarded as a part of the cost and is to be thrown entirely upon the defendant is to take from the cost an item which was as much a necessary part of such cost as any other item, and is to change the proportion of the cost for which under the statute the defendant is answerable.

Neither horn of this dilemma seems to us reasonable. In view of the history and general nature of the statutes relating to compensation for displacement of tide water, the public and imperative nature of this particular work and the unreasonable result to which any other conclusion leads, it seems clear that the only reasonable interpretation of this statute is that compensation for tide water displaced was not within its contemplation, either as a part of the cost to be assessed under the statute, or as an additional expense to be borne by the particular party to which was given the command to do that part of the work which caused the displacement.

Judgment for the defendant.

SARAH H. THOMPSON *vs.* JOHN H. CASHMAN.

Essex. January 16, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Witness, Impeachment. *Evidence*, Communications between attorney and client.

Where an attempt is made in cross-examining a plaintiff to impeach her credibility by showing that she is a spiritualist, and she says in answer, that she is not a spiritualist, it does not matter whether this was admissible or not, as the attempt failed and did the plaintiff no harm.

The counsel for a plaintiff was allowed to testify to conversations between the plaintiff, himself and the defendant, when they were all together, with a stenographer, in his office. He was acting at the time for the defendant as well as for the plaintiff. *Held*, that the conversations were not privileged.

HOLMES, C. J. This is a bill to redeem a mortgage. There was a controversy with regard to the amount to be paid, the case was sent to a master, he reported in favor of the defendant subject to exceptions taken by the plaintiff, and the Superior Court overruled the exceptions and made a decree in accordance with the report. The plaintiff appealed. The only exception not waived is to the master's admitting certain evidence of conversations of the plaintiff with her counsel.

The plaintiff having taken the stand was cross-examined on the subject in controversy. Her evidence was that she did say that the mortgage was lost; that she did not say a spiritualist told her so; that she did not remember saying anything about spiritualists, and that she never said that she was a peculiar woman, or had second sight into the future. The attempt, obviously, was to impeach her credibility by showing that she was a spiritualist and made statements on the faith of spiritualist communications, but it failed. Without going into more general matters, it is enough to say that taken by itself the plaintiff's testimony, whether rightly or wrongly admitted, did her no harm. Later, it is true, her counsel was called and testified that she said that she believed that the mortgage note was lost and that she never signed it, because a clairvoyant told her so. But this was in answer to questions by the plaintiff, to which she hardly can object now.

In his direct examination the same counsel was allowed to testify to conversations between the plaintiff, himself and the defendant, when they were all together, with a stenographer, in his office. The witness was acting for the defendant as well as for the plaintiff, if he was acting for the plaintiff at the time. Very plainly these conversations were not privileged. *Whiting* v. *Barney*, 30 N. Y. 330. *Gulick* v. *Gulick*, 12 Stew. 516. *Hanlon* v. *Doherty*, 109 Ind. 37. *Rice* v. *Rice*, 14 B. Mon. 417. *Michael* v. *Foil*, 100 N. C. 178. See also *Weeks* v. *Argent*, 16 M. & W. 817.

It is difficult to see how the plaintiff could have profited even if her exception had been sustained. We cannot doubt that the master would have come to the same conclusion if spiritualists had not been mentioned.

Decree affirmed.

E. S. Spalding & C. J. Stone, for the plaintiff.

H. J. Cole, for the defendant.

ELLEN WELCH *vs.* WILLIAM WELCH & others.

Plymouth. January 16, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Widow, Allowance as necessaries.

The fact that a widow has lived apart from her husband for several years before his death does not prevent an allowance to her as necessaries under Pub. Sts. c. 135, § 2.

A delay of about a year and a half by a widow in filing a petition for an allowance as necessaries under Pub. Sts. c. 135, § 2, accounted for by the fact that negotiations for a compromise between her and the heirs of her husband's estate were pending, is not a bar to the petition.

APPEAL from a decree of the Probate Court for the County of Plymouth, granting an allowance of $440 to the petitioner, widow of William Welch, late of Abington, by his heirs, children by a former marriage.

The case was heard by *Hammond*, J. The respondents asked

for a ruling, that on the whole evidence the petitioner was not entitled to an allowance. The justice refused so to rule and affirmed the decree of the Probate Court, with costs to neither party; and the respondents alleged exceptions.

J. P. Barlow, for the respondents.

G. W. Kelley, for the petitioner.

LATHROP, J. This case comes before us on an exception to the refusal of the single justice of this court, who heard the case on appeal from the Probate Court, to rule that on the whole evidence the petitioner was not entitled to an allowance. The amount of the allowance, if any was to be made, is not raised by the bill of exceptions.

The power to make an allowance to a widow from the personal estate of her deceased husband is given by the Pub. Sts. c. 135, § 2, and is to be made "having regard to all the circumstances of the case."

The only possible grounds on which it can be urged that the widow was not entitled to an allowance are the fact that she had lived apart from her husband for some years, and the delay in filing her petition. As to the first ground it is settled that a separation continued down to her husband's death makes no difference. *Slack* v. *Slack*, 123 Mass. 443. See also *Chase* v. *Webster*, 168 Mass. 228, 231.

Nor is a delay in filing the petition necessarily a bar. *Allen* v. *Allen*, 117 Mass. 27, where there was a delay of two years. *Lisk* v. *Lisk*, 155 Mass. 153, where there was a delay of two years and eight months. In the present case there was a delay from July 9, 1899, until December 21, 1900. This delay was accounted for by the fact, as testified to by the petitioner, that negotiations between her and the heirs of her husband's estate, for a compromise, were pending. See *Ryder* v. *Loomis*, 161 Mass. 161, 163.

Exceptions overruled.

JOHN DAVIS, executor, *vs.* JOSEPHINE M. CHASE & others.

Middlesex. January 16, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Devise and Legacy, Construction.

A single woman, having no kin nearer than cousins, by her will left $100 to the trustees of the Lowell cemetery, the income to be used in keeping the cemetery lot in proper condition, and all the rest and residue of her property "to be converted into money as soon after my decease as may be deemed expedient and advisable by my executor, and to be expended in fitting up the burial lot owned by me in the Lowell Cemetery, and in erecting a suitable and proper monument thereon." The residue of the property amounted to $8,000. The will was dated twelve years before the death of the testatrix. *Held*, that the express requirement that all the residue be expended upon the lot and monument was not limited by the description of the monument as "suitable and proper." Moreover, if the testatrix, being a single woman otherwise undistinguished, wished to prolong the remembrance of the family name by a beautiful monument over her grave, the court could not say as matter of law that it was not suitable and proper.

BILL FOR INSTRUCTIONS, filed in the Probate Court for the County of Middlesex, April 13, 1899, by the executor under the will of Louisa M. Wells, late of Lowell.

In the Probate Court, *Lawton*, J. made the following decree: "That it was the intention of the testatrix, as expressed in said clause, that her executor should expend the whole of the residue of her estate remaining after the payment of her debts, funeral expenses, the charges of administration, and the payment of one hundred dollars for perpetual care of her burial lot, in fitting up the burial lot owned by the testatrix at the time of her decease in the Lowell Cemetery, and in the purchase and erection of a monument upon said lot in her memory, and said executor is instructed to act in accordance herewith." From this decree the respondents, all cousins of the testatrix, appealed.

The case was heard by *Barker*, J., who ordered that the decree of the Probate Court be affirmed, and reported the case for the determination of the full court, such decree to be entered as justice might require.

By the report the following facts appeared: Louisa M. Wells, the testatrix, was a single woman who died in 1886 and her

will was proved and allowed in that year. The will was dated May 18, 1874. It was as follows: "My will is that all my just debts and funeral charges be paid out of my estate as soon after my decease as may be found convenient.

"2. All the rest residue and remainder of my estate, whether the same be real personal or mixed or of whatsoever name or nature the same may be, excepting the sum of one hundred dollars hereinafter bestowed, I give, devise and bequeath the same for the use and to the purpose following, viz.: the same to be converted into money as soon after my decease as may be deemed expedient and advisable by my executor, and to be expended in fitting up the burial lot owned by me in the Lowell Cemetery, and in erecting a suitable and proper monument thereon. I do give and bequeath the sum of one hundred dollars to the trustees of the Lowell Cemetery the same to be held by them and their successors in office, and the income thereof, or such part of the income of said sum as may be necessary, is to be used and expended in keeping my lot in said cemetery in proper condition.

"John Davis of Lowell appointed executor."

The property of the testatrix had been kept invested by the executor, and at the time of the hearing it amounted to about $8,000. The heirs at law contended, that the petitioner should be instructed to devote only a portion of the property in his hands as executor to fitting up the burial lot of the testatrix and erecting a monument thereon, and that the rest of the fund should be distributed among the heirs at law and next of kin.

G. A. Brown, for the appellants.

G. F. Richardson, for the appellee.

HOLMES, C. J. This is not like a case in the Roman law of a direction to bury, with an allowance of a certain sum for the purpose, where less was used. D. 31, 88, § 1. The testatrix gives "all" the residue of her estate "for the use and to the purpose following, viz.: the same [i. e. all the residue] to be converted into money . . . and to be expended in fitting up the burial lot owned by me in the Lowell Cemetery, and in erecting a suitable and proper monument thereon." The express requirement is that all the residue be spent for the purpose or rather the purposes mentioned, and this requirement is not cut down

by describing the intended monument as suitable and proper. The literal meaning of the words is confirmed by the fact that the testatrix evidently did not mean to die partially intestate. Very likely when she wrote her will she did not expect to leave so large a sum as she did, but that is a speculation. Furthermore, if a single woman not otherwise distinguished should be minded to prolong the remembrance of her family name by a beautiful monument over her grave, we could not pronounce it unsuitable or improper as matter of law. Cases like *Matter of Luckey*, 4 Redf. Surr. 95, as to what would be suitable in the absence of more special directions do not apply.

Decree affirmed.

EDWARD S. NILES *vs.* JOHN H. GRAHAM.

Suffolk. January 17, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Equity Jurisdiction, To compel new execution of mutilated instrument. *Contract*, Construction.

In a suit in equity to compel the defendant to execute anew an assignment to the plaintiff which the defendant wrongfully had mutilated, it appeared, that by an agreement in writing the defendant gave the plaintiff an equal interest in a certain patent and in return the plaintiff agreed to furnish capital as needed. It was agreed, that the patent should be assigned to the plaintiff to be held by him in trust and assigned by him "to a corporation now organized or to be organized whenever the parties may deem it advisable for the purpose of carrying on the business," and that the capital stock of the corporation to which the patent should be assigned should be divided in equal shares between the plaintiff and the defendant, but that the amount to be contributed by each to be sold for working capital should be fixed by the plaintiff. No other details were agreed upon by the parties. It further appeared, that in accordance with the agreement the defendant executed and delivered to the plaintiff an assignment of the patent, and thereafter wrongfully obtained possession of it and mutilated it by tearing off the signature and seal, thereby preventing the plaintiff from having the assignment recorded at the patent office, and thereafter refused to recognize his agreement as binding. *Held*, that the plaintiff was entitled to relief; that the provision that the plaintiff should assign the patent to a corporation "whenever the parties may deem it advisable for the purpose of carrying on the business" did not give the defendant the right to terminate the whole arrangement at any time he saw fit; that, when the defendant had transferred the patent to the plaintiff, the plaintiff was under an obligation to furnish within a reasonable time the

capital needed and the defendant under a corresponding obligation to give him a reasonable time to do so; that the defendant, wrongfully having mutilated the assignment, should execute it anew, and, upon his doing so, the plaintiff either must assign the patent to an existing corporation reasonably fitted for the purpose, or must organize such a corporation as was reasonably proper and furnish such capital as was reasonably necessary, the plaintiff and defendant having equal shares in the capital stock of the corporation whether existing or to be formed.

Since St. 1877, c. 178, this court has had full equity jurisdiction.

BILL IN EQUITY, filed January 19, 1901, to compel the defendant to execute anew and deliver to the plaintiff an assignment dated June 5, 1900, by the defendant to the plaintiff of certain letters patent issued by the United States to the defendant for an improvement in brake mechanism for railway cars.

The case was heard by *Loring*, J., who, being of opinion that the question of the plaintiff's remedy ought to be determined by the full court before further proceedings were had, ordered a stay of proceedings, and reported the case for the consideration of the full court.

The report contained the following findings of fact:

The agreement in writing hereafter printed was executed and delivered on June 5, 1900, and on the same day the assignment in question was made and delivered to the plaintiff in pursuance of the agreement.

The plaintiff rendered services and advanced money in pursuance of the agreement, and both parties deemed it advisable that the letters patent should be held by the plaintiff in trust under the agreement until certain clouds on the title of the letters patent should be removed, and a second assignment was executed and delivered to the plaintiff on August 9, 1900.

While the plaintiff was proceeding in good faith under the agreement, and was seeking to have the clouds removed, the defendant, on August 27, 1900, in the absence of and without notice to the plaintiff, wrongfully possessed himself of the written assignments of June 5 and August 9, and mutilated the assignments by tearing therefrom the signatures and seals, and thereafter refused to recognize the agreement as binding, stating to the plaintiff that he was "done."

By reason of the fact that the plaintiff and defendant deemed it advisable that no steps should be taken until the clouds mentioned above had been removed, the defendant, by his

wrongful mutilation of the assignments, deprived the plaintiff of time and opportunity to carry out the agreement of June 5, and thus by his acts prevented further performance of the agreement by the plaintiff.

The justice found that, by the making and delivery of the assignment of June 5, 1900, the title to the letters patent vested in the plaintiff as trustee, but the plaintiff's title was rendered imperfect by the wrongful acts of the defendant in preventing record of the assignment, and by the mutilation, whereby recording became impossible.

The defendant introduced testimony to show that rights of third parties had so intervened as to prevent a decree to restore the rights of the plaintiff, or for specific performance of the contract, but the justice did not find that there were any intervening rights.

On these findings, the plaintiff contended that he was entitled to a decree for a new execution of the assignment of June 5, 1900, and submitted a decree, but the justice ruled, that the agreement was too indefinite to admit of specific performance, and further ruled, that if specific performance of the whole agreement could not be decreed a decree should not be made for a new execution of the assignment, and refused to enter the decree. The defendant contended, that he was at liberty to end all arrangements between himself and the plaintiff, and that when he mutilated the assignments on August 27, he was exercising a right to which he was entitled under the agreement. The justice was of opinion that this construction of the agreement was not correct, and that the case should be sent to a master to assess the damages suffered by the plaintiff.

The agreement was as follows:

"This Agreement made this fifth day of June A. D. 1900, by and between John H. Graham of Boston in the County of Suffolk and Commonwealth of Massachusetts, Party of the first part, and Edward S. Niles of said Boston, party of the second part, Witnesseth:

"That whereas the party of the first part is the inventor and owner of certain letters patent, as follows, to wit: Letters Patent of the United States for a new and useful improvement in brake mechanism for railway cars numbered 610676; and

whereas the party of the first part desires to promote and develop the business of manufacturing and vending and licensing others to manufacture and vend appliances for railway cars under said letters patent, and to introduce said invention to general use with a view to profit to be derived therefrom, and whereas it is desired that the party of the second part shall furnish capital to carry on said enterprise, shall interest capitalists therein, and through his personal influence enlist those who will aid in carrying on said business and share its burdens and promote its welfare.

"Now, therefore, in consideration of the mutual promises herein contained said parties do hereby agree as follows, to wit:

"The party of the first part agrees to assign forthwith the letters patent hereinbefore recited to the party of the second part to be held by him in trust during such time as to the parties hereto it may seem advisable, and to be assigned by said trustee, the party of the second part, to a corporation now organized or to be organized whenever the parties may deem it advisable for the purpose of carrying on the business aforesaid.

"The party of the first part agrees to assign any other useful improvement in brake mechanism for railway cars of any sort, or devices of any kind pertaining thereto which he may invent or may acquire by gift or otherwise, and any letters patent which may be obtained therefor, to the party of the second part upon like trusts and for the purposes aforesaid. And if such letters patent or improvement are acquired as aforesaid after a corporation shall have been organized and said business shall have been merged therein, or after the aforesaid patent has been transferred to a corporation already organized, then the party of the first part agrees to assign said other letters patent, improvements or inventions to said corporation at the request of the party of the second part.

"The party of the second part agrees to furnish capital as needed and to use his best efforts to push said business and to extend the same for the best interests of all.

"It is further agreed that from the first profits derived from the prosecution of the business the party of the second part shall be remunerated for his entire outlay, whatever it may be,

but if he shall so elect the funds which may be received from royalties or otherwise may be used in increasing the business and his outlay still remain a debt to be paid in the future, and the fact that he allows it so to remain shall not be deemed a waiver of his rights to remuneration as aforesaid and shall in no way impair his claim therefor.

"It is agreed that the capital stock in any corporation already formed or to be formed, for the purpose of carrying on the business aforesaid, in which said business may be merged, shall be divided and apportioned among the parties hereto in equal shares and that said parties shall contribute of said stock to the treasury of said corporation for sale for working capital, in equal shares, so much as the party of the second part shall deem necessary for said purpose.

"It is further agreed that neither party to this agreement nor his representatives, shall sell, assign or transfer any interest under this agreement, or stock in the said corporation or corporations, without first offering the same to the other party on the same terms *bona fide* as could be obtained elsewhere.

"It is further agreed and understood by the parties hereto that should any disagreement arise between the party of the first part and the party of the second part as to any matter herein contained or as to anything pertaining to the business hereinbefore referred to before the merging of the business in a corporation as aforesaid, then, and in such case, the party of the first part shall choose one referee and the party of the second part shall choose another referee and those two shall choose a third referee, all said referees to be wholly disinterested, and to them, the said referees shall be referred for their decision any matters of disagreement or difference as aforesaid and said decision of said referees or a majority of them shall be final provided that no reference of matters in dispute as aforesaid shall be made or allowed until all sums of money and advancements made or expended by the party of the second part up to the time of such reference shall have been fully repaid to him, the party of the second part, unless such prior payment shall have been at the time of such proposed reference expressly waived in writing by the party of the second part.

"It is further agreed that if, by reason of death or disability,

the party of the second part shall be unable to furnish capital as required to carry on the enterprise, said letters patent shall be transferred to the party of the first part upon tendering of any and all sums and advancements made or expended by the party of the second part in capital stock at market value or cash up to the time of such disability *provided* that if before such disability occurs said letters patent, pursuant to the foregoing agreement, have been conveyed to any corporation, then, in lieu of a re-assignment of said letters patent, the party of the second part or his representatives shall surrender the capital stock of such corporation, delivered to the party of the second part in pursuance of this agreement, upon tender of money or stock advanced as aforesaid, except such portion of said stock as may be justly retained by the party of the second part or his representatives in view of the amount of time and service which may have been contributed to said business by the party of the second part prior to said disability. In Witness Whereof the parties have hereunto set their hands and seals the day and year above written. John H. Graham [Seal]. E. S. Niles [Seal]. Witness, R. E. Somerville."

W. O. Kyle, for the plaintiff.

F. W. Kittredge & R. A. Jordan, for the defendant.

LORING, J. We are of opinion that the plaintiff is entitled to a re-execution of the assignment of the letters patent.

By the true construction of the contract the defendant gave to the plaintiff an equal interest in the patent in question and in any future improvements made by him on the invention covered by it; and in payment for that half interest the plaintiff agreed "to furnish capital as needed." At that stage of the adventure it was not possible to go into details, and the parties agreed that the patent should be assigned to the plaintiff "to be held by him in trust" and "to be assigned" by him "to a corporation now organized or to be organized whenever the parties may deem it advisable for the purpose of carrying on the business aforesaid." It is provided that the capital stock of the corporation, to which the patent is assigned, shall be divided in equal shares between the plaintiff and the defendant, but that the amount, to be contributed by each to be sold for working capital, shall be fixed by the plaintiff. No

other details were agreed upon by the parties. It was not specified who was to decide the question, whether an existing corporation should be availed of or a new one organized, and in case a new one were organized, who was to decide the many questions, which necessarily will arise in that connection. Neither was it specified how long a time should be allowed for this purpose, or for the plaintiff to furnish the capital.

The defendant argues, from this failure to deal with these details in the agreement, and from the clause, that the letters patent were to be held by the plaintiff "in trust during such time as to the parties hereto it may seem advisable," and from the further clause, that the letters patent were to be assigned by the plaintiff to a corporation "whenever the parties may deem it advisable for the purpose of carrying on the business aforesaid," that the defendant had the right to terminate the whole arrangement at any time he thought fit.

But we do not think, that that is the true construction of the contract. Taking the contract as a whole we think that the plaintiff came under an absolute obligation to furnish the capital needed and the defendant came under a corresponding obligation to afford him time to do so. The contract contemplates that the invention is to be exploited by a corporation and that a corporation will be formed, that the capital will be furnished by the plaintiff and that the letters patent will be assigned by the plaintiff to that corporation.

When the defendant had transferred the letters patent to the plaintiff, the plaintiff was bound to furnish the capital within a reasonable time, and the defendant was bound to give him a reasonable time within which to do so. The various questions as to what corporation should be utilized, or, if a new one were organized, what, and how, it should be organized, not having been agreed upon, must be determined by what is reasonable under all the circumstances. As the plaintiff is to furnish the capital and is to decide upon the amount, which is to be contributed by each to be sold for working capital, we think that he should take the initiative in the matter of utilizing an existing corporation or organizing a new one, and that any reasonable course adopted by him must be accepted by the defendant.

The defendant, having wrongfully mutilated the assignment

to the plaintiff, should re-execute the same; upon his doing so, if the plaintiff does not within a reasonable time do one of these two things, namely, either assign the patent to an existing corporation which is reasonably fitted for the purpose, or organize such a corporation as is reasonably proper and furnish such capital as is reasonably necessary, he will commit a breach of his contract for which the defendant may have his action of damages. Whether an existing corporation or a new corporation is used, the plaintiff and defendant are to have an equal share in the capital stock.

We think that the ruling made at the hearing was wrong, that since the whole contract could not be specifically enforced by the court the defendant would not be compelled to re-execute the assignment. The amended bill in this suit in its final form, is not a bill seeking specific performance, but a bill to compel the defendant to restore to the plaintiff evidence of the assignment to him in order that among other things it may be recorded in the patent office. The mutilation of the assignment did not revest the title in the defendant, but it prevented the plaintiff from perfecting the title which as between the parties had already vested. The re-execution of lost instruments is a separate and ancient head of equity jurisdiction. *Bennett* v. *Ingoldsby*, Finch, 262. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417. *Lawrence* v. *Lawrence*, 42 N. H. 109, 112. *Lancy* v. *Randlett*, 80 Maine, 169. *Kent* v. *Church of St. Michael*, 136 N. Y. 10. The case of an instrument which has been wrongfully mutilated comes within that rule. Since St. 1877, c. 178, (Pub. Sts. c. 151, § 4; R. L. c. 159, § 1,) this court has had full jurisdiction in equity. *Billings* v. *Mann*, 156 Mass. 203. *Hurd* v. *Turner*, 156 Mass. 205, n. *Emerson* v. *Atkinson*, 159 Mass. 356, 361. *Nathan* v. *Nathan*, 166 Mass. 294. *Weeks* v. *Currier*, 172 Mass. 53. *New England Ins. Co.* v. *Phillips*, 141 Mass. 535, 545. *Old Colony Railroad* v. *Rockland & Abington Street Railway*, 161 Mass. 416, 417.

Decree accordingly.

ELIZA M. BROWN *vs.* OTIS WENTWORTH & another.

Essex. January 20, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Mortgage, Redemption, Foreclosure sale.

A mortgagor has not as matter of law a right to redeem after a foreclosure sale and before the conveyances are executed to carry it out. *Semble*, that, even before the sale, if the property has been advertised, under St. 1888, c. 433, a bill to redeem cannot interrupt the mortgagee's right to proceed to conclude the mortgagor's rights, unless the amount due is paid into court or an injunction issues.

In an attempt to comply with Pub. Sts. c. 181, § 17, St. 1882, c. 75, a mortgagee's advertisement of a foreclosure sale of land in Hamilton was published in the Wenham-Hamilton Times, which the mortgagee's agent supposed to be issued in Hamilton, but which in fact was issued in Beverly in the same county. No paper was printed and issued in Hamilton. There were twenty-four subscribers there to the Wenham-Hamilton Times. *Held*, that probably it was a mistake to suppose that the paper was published in Hamilton in such a sense as to make the choice of it compulsory; but, if not published there, it was a "newspaper published in the county where the mortgaged premises are situated" and fulfilled the requirement of the statute.

A first mortgage embraced three lots. A second mortgage covered these lots and three others. Foreclosure sales under both mortgages were advertised for the same time, the sale under the first mortgage as in front of a hotel on the premises, and that under the second mortgage as in front of a barn across the road from the hotel. The sale under the first mortgage took place first, so that under the second mortgage there remained only three lots to sell, although the advertisement had announced a sale of six lots, the first three subject to the first mortgage. The sale in form followed the advertisement. The persons present at the first sale walked across the road and attended the second, understanding what had been done. The lots not included in the first mortgage brought a fair price at the second sale. *Held*, that the sale was good.

BILL IN EQUITY, filed June 9, 1899, to redeem from two mortgages, the first for $5,000 covering three parcels of land, and the second for $1,700 covering the same parcels and three others adjacent thereto, all on the shores of Chebacco Lake in Hamilton in the county of Essex and the first three parcels having thereon a hotel known as the Winnepoyken House.

At the trial in the Superior Court, before *Pierce*, J., without a jury, the plaintiff asked the judge to make the following rulings:

1. That upon all the evidence the plaintiff is entitled to redeem. 2. That the plaintiff, as of right, is entitled to redeem by having brought his bill and offering therein to pay what is due, previous to the conveyance of the property to the purchaser. 3. That the evidence discloses that the defendant, Wentworth, the mortgagee, in view of the location and character of the property, failed to exercise proper diligence and fairness in the sale thereof. 4. That the attempted sale of the six lots included in the second mortgage after an attempted sale of the first three therein embraced under the power of sale in the first mortgage, is an invalid execution of the power of sale, and rendered the sales void. 5. That when the defendant Wentworth advertised to foreclose under both mortgages simultaneously, he was confined to a sale under the second mortgage. 6. That a sale of the three lots under the power in the first mortgage rendered void the sale of the same premises under the second mortgage. 7. That the conduct of the purchaser at the sale in inducing an intended purchaser to refrain from bidding, rendered the sale invalid.

The judge refused to make any of these rulings, and made the following findings of fact: 1. That Wentworth exercised all proper and reasonable diligence in the matter of the publication of the notice of the foreclosure, and acted in entire good faith and with a reasonable regard to the rights of the mortgagor. 2. That the property was fairly and properly sold and brought a fair price. 3. That Oliver F. Kilham did not intend to become a *bona fide* purchaser of the property sold under the second mortgage, but did intend to intimidate would-be purchasers by threatening to run up the property and to extort a money payment as a condition of his refraining from bidding thereon and that the payment to him by Allen, one of the purchasers at the sale, was made under such pressure and was not intended by Allen to interfere or deter Kilham from making any honest bid. 4. That the sum bid upon the second sale was a fair price for the lots not included in the sale under the first mortgage.

The judge ordered the bill dismissed without costs, and the plaintiff appealed. At the request of the plaintiff, the judge reported the case for the consideration of this court. If the

decree entered was right, it was to be affirmed; otherwise, such decree was to be entered as law and justice might require.

In regard to the publication of the Wenham-Hamilton Times, in which the sale was advertised, one Vittum, a witness for the plaintiff, testified as follows:

"I live in Beverly and publish the Wenham-Hamilton Times, and also publish the Beverly Evening Times, the Essex County Mercury and the Beverly Weekly Times; all weeklies except the Beverly Evening Times; in May and June, 1899, there were twenty-four subscribers to the Wenham-Hamilton Times in the town of Hamilton; I could n't say how many in the town of Wenham; one hundred and twenty-five copies of the paper were printed; it goes to Wenham and outside subscribers, but mostly to Hamilton and Wenham; all these papers were printed in the same place in Beverly, Mass.; in May and June of 1899, there were four hundred copies of the Essex County Mercury printed; this is a home paper and sent through the county to the different homes; I have no office in either Hamilton or Wenham; . . . I received directions to insert advertisement in reference to foreclosure of mortgages on Winnepoyken property from Pettingell's Advertising Agency in Boston; order was to print it in the Wenham-Hamilton Times; the advertisement appeared in the Mercury and the Beverly Weekly Times, because they are practically the same paper, the only changes being made are the headings, the place of publication and those advertisements which are ordered changed, and they are all printed and published in the office in Beverly."

On cross-examination, the witness testified: "I should say that Hamilton has not more than one thousand inhabitants and Wenham about the same; there is no paper published in either of these towns at all; Beverly papers are the nearest to this land of any that are published, and the notice was published in the three weeklies referred to."

J. J. Flaherty, *J. F. Quinn* & *W. H. Twohig*, for the plaintiff.

H. P. Moulton & *F. V. Wright*, for the defendants.

HOLMES, C. J. This is a bill to redeem land from two mortgages. It was dismissed by the judge of the Superior Court who tried the case, and it comes here by appeal. The judge

found that the mortgagee acted in good faith and with reasonable regard for the rights of the mortgagor, and that the property was fairly sold and brought a fair price. Of course these findings, so far as they depend on oral testimony as to the conducting of the foreclosure, would not be disturbed except upon strong reasons. We see no ground for doubt that the findings were right, subject to the questions which we shall mention. Some comment is made upon an alleged refusal by the mortgagee to accept $400, (about the amount of the interest for one year, interest for more than two years being due,) if he would postpone the sale. But the mortgagee evidently regarded the suggestion as the talk of an irresponsible person, and very probably was right. The money was not produced. There is no indication of any animus on his part other than an old man's weariness and desire to get rid of a mortgage which was always in arrears. He put the foreclosure into professional hands, and relied upon those whom he employed to see that all proper steps were taken. *Cranston* v. *Crane*, 97 Mass. 459, 464.

In the first place, the plaintiff claims a right to redeem as matter of law because the bill, although filed after the sale, was brought before the conveyances were executed to carry it out. We are of opinion that she has no such right. Unless there was some defect in the proceedings, her rights were gone when the contract was made. This, we apprehend, would be so apart from St. 1888, c. 433, (see *Way* v. *Mullett*, 143 Mass. 49, 53; Pub. Sts. c. 181, § 21,) and we see no reason to doubt that that statute means that, even before the sale, if the property has been advertised, the filing of a bill to redeem shall not interrupt the mortgagee's right to proceed to conclude the plaintiff's rights, unless the amount due is paid into court or an injunction issues. See 143 Mass. 55, 58. The plaintiff failed to pay the money into court and no injunction issued.

Next it is said that the advertisement was bad, because it described the premises as woodland and did not mention that there was a somewhat well known hotel, the Winnepoyken House, upon them, and also because the paper selected was not a proper one. The first mentioned fact undoubtedly would be a matter to be considered, if strictly true, although it hardly of itself and necessarily would invalidate the sale. But it is

not strictly true. The sale under the first mortgage is announced to take place in front of the Hotel situated on the premises. As to the newspaper the facts are these. The one selected was the Wenham-Hamilton Times, and it was chosen in order to comply with Pub. Sts. c. 181, § 17, St. 1882, c. 75, under the impression that it was published in the town of Hamilton where the mortgaged property was situated. Probably it was a mistake to suppose that the paper was published there in such sense as to make the choice of the paper compulsory, since it was a many headed publication like that dealt with in *Rose* v. *Fall River Five Cents Savings Bank*, 165 Mass. 273, and seems to have had its home in Beverly. But the choice was made in good faith by the agent to whom the matter was intrusted. The paper was published in the county, which is the only requirement of the mortgage and the alternative requirement of the statute. In its various forms it circulated in the town of Hamilton and the vicinity, and, although it is said that it does not appear that it was published at the proper times under its other names, it is for the plaintiff to show that it did not do so, so far as the fact is material. The chances are that the publications were simultaneous. The selection of the Wenham-Hamilton Times carried out in the nearest way possible the policy of the statute, which aims at making the sale known in the neighborhood rather than in large centres. We are of opinion that the foreclosure cannot be upset on this ground. See *Stevenson* v. *Hano*, 148 Mass. 616.

It is said that, if the advertisement was sufficient, at least the sale was bad. The first mortgage embraced three lots, the second covered these and three others. The advertisements were printed consecutively, and announced both sales for the same time, that under the first in front of the hotel, the other in front of the barn. It is complained that, whereas the advertisement of the second mortgage announces a sale of the six lots, the first three subject to the first mortgage, in fact the sale under the first mortgage took place first and therefore only the three other lots remained to be sold, although in form the sale followed the advertisement. But it is obvious that this is the merest technicality. The persons present at the first sale walked across the road and attended the second, understanding

what had been done. It could not matter to an intending purchaser under the second sale whether he bought the whole six lots only to see his title to three wiped out five minutes later, or whether he bought the three which were all that he could get. If any such intending purchaser had wished to buy under the second mortgage and to redeem from the first, he would have bid or made a tender at the first mortgage sale, which was all that he could do in any event. There is not the slightest reason to think that the mortgagor suffered, and the judge finds that the lots not included in the first mortgage brought a fair price at the second sale. The purchaser does not complain. He is a defendant. There was no attempt to depart in substance from the power given by the mortgage and from what was advertised, as in *Donohue* v. *Chase*, 130 Mass. 137, and this is not a case where the advertisement was wrong, as in *People's Savings Bank* v. *Wunderlich*, 178 Mass. 453, and *Fenner* v. *Tucker*, 6 R. I. 551. See *Bottineau* v. *Ætna Life Ins. Co.* 31 Minn. 125.

The last ground of attack, also bearing on the sale, is the allegation that the purchaser bought off another bidder from the second sale for $100. Whatever happened was without the privity or knowledge of the mortgagee, and the judge finds that the man alleged to have been bought off did not intend to become a purchaser in good faith, but merely meant to extort a payment by threatening to run the property up, and that the payment was made under that pressure, not for the purpose of preventing an honest bid. The finding of the judge was fully warranted by the evidence. We think it unnecessary to say more.

Bill dismissed.

HETTY H. R. GREEN & another *vs.* WILLIAM W. CRAPO, trustee & executor.

Bristol. January 20, 1902. — March 1, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Trust, Sound discretion of trustee. *Evidence*, Communications between attorney and client, Declarations of deceased persons, Book entries.

Trustees under a will received from the executor in 1870 shares of a manufacturing corporation at $95 a share. The stock paid dividends until 1881 when it stood at $100 a share. The next year it dropped, and continued to go down until in 1885 it became worthless. The trustees were men of good business capacity and experience, their honesty was not disputed, and they were successful in the management of the trust as a whole. On an appeal by a life tenant from a decree allowing the accounts of the trustees, it was *held*, that it did not appear that the trustees were wanting in sound discretion in keeping the stock.

In 1885 and 1886 trustees under a will bought and held bonds of a small western railroad, which did not pay its operating expenses, guaranteed one half each by two great railroad companies between whose roads it ran. Both great companies became insolvent, but one of them in reorganization made a provision for its guaranty which exceeded in value one half of the original investment. On an appeal by a life tenant from a decree allowing the accounts of the trustees, it was *held*, that it did not appear that the trustees were wanting in sound discretion in purchasing the bonds in 1885 and 1886 and in retaining them afterwards.

A testatrix died leaving an undivided half interest in unproductive land which was but a moderate fraction of a large estate. The other half belonged to the life tenant under the will. Nearly all the rest of the trust fund was invested in interest bearing or dividend paying securities. The will directed the trustees to sell all portions of the estate which were unproductive "and which in their judgment ought to be sold." It also directed, that from the rents, profits and income from the property the trustees should pay all taxes, expenses and commissions, "and the balance of said rents, profits and income shall be deemed to be the net income from the said estate; and I direct the said Trustees to pay the said net income" to the life tenant. During twenty-six years the life tenant received an income of about three and three quarters per cent on the whole property, and in the meantime the capital increased substantially in value. The life tenant during the whole period did not want the land sold and was unwilling to sell her share, and the trustees continued to hold the half interest in the unproductive land. On an appeal by the life tenant from a decree allowing the accounts of the trustees, the life tenant contended that she should be allowed interest on the fair selling value of the land retained. *Held*, that, apart from the definition of net income in the will, the trustees could not be made liable for failing to sell land which they expressly were authorized to keep if they thought it wise, and which practically could not have been sold without the concurrence of the life tenant who refused to give it.

When the privilege of communications between attorney and client has been

waived, by the client being present in court and allowing the attorney to testify to the conversation without objection, and by herself testifying in regard to the conversation, on appeal to a higher court she cannot withdraw her waiver. *Whether* a different rule should obtain with regard to testimony tending to incriminate a witness, *quære*.

Semble, that a business letter press copy book of a deceased person may be admissible under St. 1898, c. 535, as containing declarations formerly excluded as hearsay, or possibly as containing entries made in the regular course of business, to show that the letters copied therein had been put in the regular channel for transmission, from which it might be inferred that they had reached their destination. *In this case* the letter press copies had been admitted in the court below in the presence of the appellant and her counsel without objection and she had there testified that she did not receive a part of the letters addressed to her or did not remember having received them. *Also*, in this case the admission of the letters did not affect the result.

APPEAL from a decree of the Probate Court for the County of Bristol allowing twenty several accounts of Edward D. Mandell, deceased, and William W. Crapo, as trustees under the will of Sylvia Ann Howland, William W. Crapo also being the executor under the will of Edward D. Mandell.

The case was heard by *Hammond*, J., who made a decree allowing the accounts except as to certain objections which were sustained by consent. From this decree an appeal was taken by the life tenant under the will and by her son, one of the present trustees. Later a bill of exceptions was allowed. The questions raised are stated by the court. The facts appearing by the record as to the waiver by the life tenant of the privilege as to communications to her counsel were as follows:

The counsel for the petitioners proposed to inquire of Mr. Crapo while he was on the stand as to conversations between him and Mrs. Green before his appointment as trustee and when he was acting as her counsel. The appellants objected on the ground of privilege.

The petitioners thereupon called Mr. Prescott as a witness, who testified that he was present at the hearing in the Probate Court, acting as assistant counsel, and also testified as follows: "*Q.* (By Mr. Knowlton.) Mr. Prescott, was Mr. Crapo on the stand in that court? *A.* Yes, sir. — *Q.* Was he asked about conversations with Mrs. Green prior to his appointment as trustee? *A.* Yes, sir. — *Q.* Was any privilege raised by Mrs. Green or her counsel at that time? *A.* No, sir. — *Q.* Was Mrs. Green

inquired of in reference to her conversations with Mr. Crapo before he was trustee? *A.* Yes, sir. — *Q.* By Mr. Storey? *A.* Yes, sir. — *Q.* She took the stand and swore to it? *A.* Yes, sir."

The justice ruled that the privilege was waived, and, having been waived, could not then be insisted upon, and admitted the evidence.

In accordance with a request of the appellants, the justice made the following report of the facts found by him, so far as material:

"The case was heard by me on the statement of agreed facts hereto annexed, and the oral testimony of William W. Crapo, the petitioner. Upon the testimony of Mr. Crapo I find that all the trustees were men of good business capacity and experience, and that they acted in good faith and for what they believed to be the best interest of the estate as a whole and of the separate interests of the *cestui que trust*. I find also, upon his testimony, that in their attempt to sell their interest in lands owned in common by Mrs. Green, the appellant individually, and the trustees, they were embarrassed by her refusal to join with them and sell the part owned by her individually. I rule that the facts agreed as above stated and my further finding as above stated do not conclusively show as a matter of law that the trustees were negligent, and having so ruled, I find as an inference from the above agreed facts and findings that in the purchase of the bonds of the Leavenworth, Topeka and Southwestern Railroad in 1885 and 1886, and in incurring the expenses on the same as stated in the fourteenth and fifteenth accounts of the trustees, and in the management of the real estate, the trustees were not guilty of negligence in the discharge of their duty, but acted in good faith and with reasonable fidelity."

S. L. Whipple & H. W. Ogden, for the appellants.

H. M. Knowlton & O. Prescott, Jr., for the appellee.

HOLMES, C. J. This is an appeal from a decree of the Probate Court allowing the accounts of the trustees of the will of Sylvia Ann Howland. The case comes here in a slightly irregular form, as a decree was entered by the single justice of this court and an appeal taken while exceptions were pending, as it would seem, since afterwards a bill of exceptions was allowed.

No notice was taken of this inadvertence at the argument, and it is not important. There is no misunderstanding as to the questions intended to be raised. The appellant was given the net income, as defined in the will, of the residue of the estate during her life. She seeks to have an investment of $40,850, made in 1885 and 1886, in fifty bonds of the Leavenworth, Topeka and Southwestern Railroad Company, and an item of $2,087.75, on account of twenty-three shares of the Washington Mills received from the testatrix, disallowed, and to receive interest on the sums with which the trustees are charged. She further contends, as to certain parcels of unproductive real estate received from the testatrix and admitted properly to have been retained, that, as against the remaindermen, she should be allowed interest on the fair selling value, and as to such land as has been sold there should be an apportionment between capital and income. She makes a similar contention as to one hundred and sixty-two shares in the Maine Central Railroad, inventoried in 1870 at $30 a share and sold in 1880 for $47.50 a share, having paid no dividends meantime. There are also certain questions of evidence in connection with the management of the real estate.

The shares in the Washington Mills were turned over to the trustees by the executor on March 1, 1870, at $95 a share. Dividends were received and paid over from that time until January, 1881. In 1881 the stock stood at par. It dropped considerably the next year, and continued to go down until in 1885 the mills failed. It is impossible for us to say on these bare facts that the trustees, who are found to have been men of good business capacity and experience, and whose honesty is not disputed, were wanting in sound discretion simply because their judgment turned out wrong. The success of their management of the trust as a whole makes it probable that their decision not to "sell the stock bought by the [testatrix], upon a falling market" was wise on the knowledge then possessed. *Bowker* v. *Pierce*, 130 Mass. 262, 264. The finding of the single judge must stand.

Then as to the purchase of the fifty railroad bonds. United States bonds were sold in order to make the investment, and the contrast in security was pressed at the argument. But that is only a dramatic circumstance. It was permissible at least, to

sell the United States bonds which stood at a premium and paid but a small return upon their value. At all events it was to the advantage of the life tenant, who, it is testified, wanted the fund to yield more income. The power to sell was not bound up with the reinvestment, as in some English cases. *Norris* v. *Wright*, 14 Beav. 291, 304. The question is whether, having money to invest, the trustees were justified in buying these bonds. The road was a little road connecting the Atchison with the Union Pacific. In 1885 and 1886, as appeared by Poor's Manual, it did not even pay its expenses. But a controlling interest in the stock was owned by those two great railroads and the bonds were guaranteed by them, one half each. These facts went far to warrant a belief that the small road was regarded as necessary by the great ones, and that they stood behind its obligations. It is said that they had no power to guarantee the bonds, but that does not appear, and we cannot assume the fact in the particular case on the strength of a general doctrine. On the contrary, in the reorganization of the Atchison after its collapse, the guaranty was treated as a valid obligation of the company, and the securities received now exceed in value one half of the investment, and pay a larger income than the bonds which were sold to make it.

Again, it is said that the guaranties were of no value and should have been seen to be so because neither the Atchison nor the Union Pacific were paying dividends and their stock stood considerably below par. The value of the Atchison's guaranty appeared in the sequel, and why that of the Union Pacific turned out worthless is left to conjecture. In 1885, at the time of the first purchase, Atchison stock sold at from 67 to 70, and Union Pacific at from 47 to 51. In 1886, at the time of the second purchase, Atchison stock sold at from 91 to 98, and Union Pacific at from 58 to 67. The lowest of these prices indicated that the public estimated the value of both properties as many millions above all liabilities. Both roads were in good financial repute. The bonds, which were four per cent bonds, rose in price with the Atchison and Union Pacific stock, from seventy-seven and one half per cent to eighty-four and a half. Considering the nature of the bonds, the prices indicated a fairly good opinion of them on the part of the public. In the course

of 1885, Chicago, Burlington and Quincy four per cent bonds of different classes could be bought at from about eighty-four to about ninety-three. Moreover, at that time intelligent investors bought many bonds of little roads which were part of the system of a great road, and were backed by it, precisely because on account of their small size they were less known and could be got at a less price than the bonds of the main lines. No doubt some cautious investors would have declined the security of any road that did not pay its own way, but it is within the memory of men still living that guaranties like the one in question were regarded by the general public as a sufficient security. The appellant, who hardly would ask to be considered quite helpless in matters of business judgment, knew of the investment, and received the interest from the bonds without objection or criticism, so far as appears.

A purchase of bonds like those in question would be harder to justify at the present day, after the legal discussions and the financial experiences of the last fifteen years, but realizing as nearly as we can how things looked in 1885 we are of opinion that the justice of this court before whom the hearing was had was right in refusing to find the trustees wanting in the sound discretion that the law requires of them. We think it unnecessary to bolster our conclusion by a reference to the large authority given to the trustees by the will, or to the success of the administration of the trust as a whole. See *Brown* v. *French*, 125 Mass. 410.

The other great question is the claim made against the capital for income in excess of that actually received as such from the real estate. In the first place it is to be noticed that the land was but a moderate fraction of a large estate. The inventory value of the former was $77,330, that of the whole trust fund was $1,350,084.70, nearly all the rest of the trust fund being invested in interest bearing or dividend paying securities. Turning to the will, we find the trustees directed to sell all portions of the estate which are unproductive "and which in their judgment ought to be sold." Thus the testatrix contemplated that it might be that in the trustees' judgment some of the thirty-one parcels in which she was interested ought not to be sold, and it was natural that she should have this in view, considering the

small proportion of unproductive property which she left and seeing that most of the lots now in controversy were owned by her as tenant in common with the appellant, and, if the evidence is admissible, which we shall consider later, that the appellant did not want to sell.

The testatrix had it in mind, we say, that part of her unproductive property might not be sold, and having it in mind she defined what the appellant was to have, by defining what she called net income. She gave the residue to trustees and empowered them to manage and improve "the whole of said estate," "and from the rents, profits and income from the said property" she directed them "to pay all taxes, expenses, charges and commissions of whatever name or nature, that shall be assessed upon or arise from or grow out of the said Residuary Estate, or the management, care or disposition thereof, and the balance of said rents, profits and income shall be deemed to be the net income from the said estate; and I direct the said Trustees to pay the said net income" to the appellant. She gives her the actual income thus determined and defined, nothing more. This will was executed on September 1, 1863. It would not be an extravagant conjecture that the net income to be received by the appellant was defined thus carefully in view of the then very recent decision in *Kinmonth* v. *Brigham*, 5 Allen, 270, and to avoid any argument that might be drawn from that case. But the argument, if not already excluded, at least was much weakened by the difference of circumstances. *Kinmonth* v. *Brigham* dealt with an investment in a partnership which it was the duty of the trustees to get out of as soon as they could. Here we are considering an investment which the trustees were expressly authorized to keep if they thought it wise.

It is not necessary to say that the construction of the will disposes of every imaginable case in which the trustees should not go outside the authority given to them. But we certainly think that it leaves little more to be said upon the matter now under consideration. The cases warrant some regard being had to the administration of the fund as a whole, *New England Trust Co.* v. *Eaton*, 140 Mass. 532, 542, 543; *Hemenway* v. *Hemenway*, 134 Mass. 446, 452, 453, and that perhaps was the scheme of the will. At all events, in other cases income has profited at

the expense of capital. The appellant received the whole interest on $700,000 United States bonds inventoried at $728,000, and, when the bonds were called in in 1877, a loss of $10,500 was charged to capital. If the calculation of the trustees is right, and we did not hear it disputed, the appellant has received something like four and three quarters per cent net income a year on the whole property for the twenty-six years from 1872 to 1898; and meantime the capital has increased in value more than $175,000.

The foregoing argument gains in strength, and an independent one arises, if we are at liberty to consider the attitude of the appellant. As we have said, she was a tenant in common with the trustees of most of the land in controversy, and there is no doubt that she did not want to sell, if the evidence is admissible. The evidence is of two sorts, conversations with Mr. Crapo, one of the trustees, before he became such and while he was her counsel, and afterwards when he was trustee, and letters of Mr. Mandell, one of the trustees, now deceased, to the appellant and to her husband. The only important part of Mr. Crapo's testimony concerned the time when he was trustee, and therefore was admissible without help from other facts. Of course the appellant's communications with him while he was her counsel were privileged, but they were unimportant and it appeared that the privilege was waived in the Probate Court. Nevertheless the objection was urged when the case came to be tried before the justice of this court, and an exception was taken when he ruled that the privilege having been waived could not be insisted upon before him. We do not think it necessary to remark upon the willingness to hold back this testimony. We content ourselves with saying that the ruling was right. The privacy for the sake of which the privilege was created was gone by the appellant's own consent, and the privilege does not remain under such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice. *McKinney* v. *Grand Street, Prospect Park and Flatbush Railroad*, 104 N. Y. 352.

Whether a different rule should obtain with regard to testimony tending to criminate the witness, as held in *Georgia Railroad & Banking Co.* v. *Lybrend*, 99 Ga. 421, 439, it is

unnecessary to decide. Evidently somewhat different considerations apply.

The objection to Mr. Mandell's letters, or rather to his letter press copies, was that it did not appear that the documents copied ever had been sent. They had been let in in the Probate Court, in the presence of the appellant and her counsel, without objection, and the justice of this court let them in, together with evidence of the appellant's testimony below that, as to those addressed to her, in part she did not receive them or did not remember having received them. It hardly is necessary to spend much time on this question, as it is evident from what we have said that the appellant must fail whether the letters are in or out, and the justice's finding purports to have been made without regard to them. It would not be much of an extension of *McKay* v. *Myers*, 168 Mass. 312, and St. 1898, c. 535, to let them in even without the appellant's partial admission. The copying of letters into a business letter book, having reference to ordinary practice, imports a declaration that they are in the course of transmission, and when the copying was by a man now dead, it would not be a great strain to hold his implied declaration to be within the statute. Or, as was argued for the trustees, the copying might be treated like an entry in the regular course of business. See *Produce Exchange Trust Co.* v. *Bieberbach*, 176 Mass. 577, 587, and cases cited. If the letters are shown to have been put in the regular channel for transmission, it might be inferred that they reached their destination. *Swampscott Machine Co.* v. *Rice*, 159 Mass. 404. Certainly we should not disturb the judge's finding because of this ruling.

It is urged that whatever the appellant may have done in her private interest as co-tenant did not diminish her rights by virtue of her equitable life estate in the other fraction of the land belonging to the trust, and that the trustees might have made partition or sold the undivided interest. We shall not discriminate more nicely than the appellant ever dreamed of doing. The sale of an undivided interest would have been absurd, and it is altogether probable that partition was as impracticable as it was undesired. If the petitioner had wished to throw upon the trustees the responsibility of dealing with divided lands, and of seeing that she got her return from them apart from the increase

in value of her own portion, it was within her power to do it. She was as able to compel a division as the trustees, but she did not want it until after the event.

It was assumed by both sides that in the case of the Maine Central Railroad stock, sold at a great advance after having been kept about ten years without receiving any dividends, the same rule would be applied as that which should be held to govern the unproductive land. Nothing need be added with regard to it.

We have disposed of the exceptions and appeal of the life tenant. No one else appeared or excepted, and therefore no other questions are open.

Exceptions overruled; decree affirmed.

GEORGE M. KELSEY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

ALICE KELSEY *vs.* SAME.

FRANK L. MORSE, administrator, *vs.* SAME.

SAME *vs.* SAME.

Hampden. November 12, 1901. — March 3, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Negligence. Railroad.

It is not negligence for an engineer to sound the whistle of a locomotive engine as he is passing under a bridge which is part of a highway, unless something more is shown.

It is not negligence for a railroad company to build and maintain an open bridge with a plank floor carrying a highway over its tracks with slight cracks between the planks, so that steam comes up through the cracks when an engine is passing beneath, if the bridge is built in accordance with orders of the county commissioners.

If a railroad company when building an open bridge to carry a highway over its tracks, is required by an order of the county commissioners to put in certain timbers to protect the edges of the planking from any injury from wheels, a failure to do this does not make the railroad company liable for an accident caused by a horse taking fright from steam coming up through cracks between the planks of the bridge, which could not in any way have been prevented by having the required timbers.

LATHROP, J. These are four actions of tort. The first two are for injuries sustained by the plaintiffs while living, and which since their death are prosecuted by their administrator. The last two are brought by their administrator to recover for their deaths. The four cases were tried together, and at the close of the evidence the presiding judge directed the jury to return a verdict for the defendant in each case; and the cases are before us on the plaintiffs' exceptions.

The record is a long one, as it contains all the evidence introduced at the trial, but we think that the facts, so far as the questions of law are involved, may be briefly stated. The plaintiffs in the first two cases were husband and wife. Late in the afternoon of June 2, 1900, they started to drive from Westfield to Holyoke in an open wagon drawn by one horse. With them were two of their children, a boy of fourteen and a girl of thirteen. Some miles out from Westfield, while crossing a bridge over the railroad of the defendant, the horse was frightened and ran. The wagon was overturned, the persons inside were thrown out, and the plaintiffs in the first two cases sustained injuries from which they died in the following month.

The first count in each of the two cases is for negligence in sounding the whistle of a locomotive engine under the bridge upon which the plaintiffs were passing. We assume for the purposes of the case that there was evidence that Mr. Kelsey was in the exercise of due care, and that the horse was frightened by the sounding of the whistle. The question remains whether there was evidence that the defendant was guilty of negligence in blowing the whistle. The bridge was not in a thickly settled neighborhood, but in a wild, rocky country. There was a stone quarry near by, and there were a few houses along the highway, at some distance apart, none near the bridge. The highway as it approaches the bridge from Westfield runs nearly parallel with the railroad, then it makes a sharp turn to the right a short distance from the bridge, and after crossing the bridge runs in a straight line about thirty feet and then turns sharply to the left. The place where the wagon was overturned was about seventy-five feet from the bridge. The bridge itself was twenty feet wide and twenty-two feet six inches long be-

tween the abutments, and the distance from the top of the rails to the bottom of the planking of the bridge was eighteen feet, nine and one-half inches. The railroad could not be seen from the highway until the bridge was reached, nor could any part of the highway be seen from the railroad except the bridge. When the train was first seen by the occupants of the wagon, the tender of the locomotive engine was just going under the bridge. There is no evidence in the case that the engineer of the locomotive engine saw the horse and wagon before the whistle was sounded, or had any cause to suppose that when it was sounded there was a horse upon the bridge. The train of fifteen freight cars was going towards Westfield, at the rate of twenty-eight or thirty miles an hour, down grade, steam being shut off, and the horse went over the bridge at a good rate of speed; and it is obvious that the opportunity for seeing a horse and wagon on the bridge was very brief. It cannot be said, then, that there was anything wanton or reckless in sounding the whistle.

The rules of law which govern this case are well settled. In *Favor* v. *Boston & Lowell Railroad*, 114 Mass. 350, it was held that where the horse of a traveller upon the highway was frightened by the noise of a train passing upon an overhead bridge, the traveller could not recover for injuries resulting from the fright of the horse. The same rule was applied in *Lamb* v. *Old Colony Railroad*, 140 Mass. 79, where a horse, on a highway running parallel to the railroad, was frightened by the smoke coming from the locomotive, caused by adding coal to the fire, if such act at that place was necessary in the ordinary running of the train; and that it was not the duty of those on the engine to be on the lookout for travellers on the highway who might be endangered by such act.

So, it was held in *Howard* v. *Union Freight Railroad*, 156 Mass. 159, that steam escaping from the safety valve of a dummy engine, lawfully upon the streets of a city, and frightening a horse, did not show negligence on the part of the railroad company.

If, however, the sound of a whistle is unduly prolonged when the train is not in motion, and the engineer sees horses seventy feet off, this may be found to be negligent. *Flynn* v. *Boston &*

Albany Railroad, 169 Mass. 305. It was however said in this case: "The engineer and conductor were not bound before giving the signal to look and see if there were any persons on the highway."

The burden of proof was upon the plaintiffs to show that not only was a whistle sounded, but that the sounding was negligent. While there was evidence that there was no whistling post near the bridge nor a station near by, the plaintiffs should have gone further and shown that there was no occasion for a whistle to be sounded. Where a railroad and a highway cross each other at different grades, there is no presumption of negligence in sounding a whistle on an overhead bridge, or in sounding it under a bridge, over which passes a highway. *Cincinnati, Indianapolis, St. Louis & Chicago Railway* v. *Gaines*, 104 Ind. 526. *Farley* v. *Harris*, 186 Penn. St. 440.

We are of opinion that, under all the circumstances of this case, there was no sufficient evidence of negligence on the part of the defendant in blowing the whistle.

The second count in each declaration in the first two cases alleges that the bridge was defective, and that the horse was frightened by steam and smoke from the whistle and the smoke stack, coming up through cracks in the flooring of the bridge. One witness testified that some of the planks, he should judge, were three eighths of an inch apart, or more. Another witness was asked how much the planks were open, and answered: "Well, I could n't say. Somewhere in the neighborhood of half an inch, I should judge." There was evidence that steam came up through the cracks and over the sides of the bridge. There was very slight evidence that the steam coming through the cracks had anything to do with frightening the horse. But it is not necessary to consider this, as we are of opinion that the evidence does not show any defect in the bridge. The cracks were slight, and such as might be expected to exist in an open bridge with a plank floor. Moisture would swell the planks, and make them approach each other, and dry weather would shrink them and cause them to recede. There was no testimony in the case to show that the bridge was not built in exact accord with the orders of the county commissioners; but the plaintiff's counsel has called our attention to the fact that the

order of the county commissioners contains the following requirement: "Whenever a bridge is covered with plank, the top of the planking must be at grade and a stick of chestnut timber, ten inches on the bottom and inside, and sloping to eight inches on the outside thereof, must be firmly imbedded upon each side of the bridge for securing the edges of the plank from any injury from wheels in their passage to and from said bridge." The counsel contend that certain photographs put in evidence at the trial, and which are before us, show that these timbers were not put in. This is apparently so, but the object of the requirement was to protect the edges of the planks, and if the defendant did not strictly comply with the order of the county commissioners in respect to the timbers, there is nothing to show that such non-compliance was in any way the cause of the accident.

As we have found that there was no sufficient evidence of negligence on the part of the defendant, in the first two cases, it follows that the plaintiffs in the last two cases, whether they are brought under the St. of 1898, c. 565, or the Pub. Sts. c. 52, § 17, as contended by the plaintiffs, or under the latter statute alone, as contended by the defendant, cannot maintain their actions for the death of their intestates.

The order in each case must be

Exceptions overruled.

A. L. Green & F. F. Bennett, for the plaintiffs.

W. S. Robinson, for the defendant.

HENRY W. MERRITT *vs.* JOSEPH H. JACKSON.

Suffolk. November 22, 1901. — March 3, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Bills and Notes, Reasonable time for demand. *Negotiable Instruments Act. Evidence*, Burden of proof.

In the absence of any evidence of usage of trade or facts of the particular case to bring it within St. 1898, c. 533, § 193, a demand on a promissory note payable on demand must be made within sixty days of the date in order to hold an indorser. *Semble*, that, if there is any such usage or any fact or circumstance to excuse a delay in making the demand, the burden is on the holder to show it.

LATHROP, J. This is an action against the defendant as indorser of four promissory notes, made by the Jackson Typewriter Company, payable to the defendant, upon demand, and indorsed by him in blank. One note is dated December 19, 1899, and the other three are dated January 5, 1900. Demand was made and notice given on April 4, 1900.

In the Superior Court, after the introduction of evidence not material to the exceptions, the defendant requested the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused so to rule, and found for the plaintiff; and the case is before us upon the defendant's exceptions. The only question in the case is whether the demand was made within a reasonable time.

The St. of 1898, c. 533, § 71, is in part as follows: "Where it [the instrument] is payable on demand presentment must be made within a reasonable time after its issue."

Section 193 of the same act provides: "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case."

Before the St. of 1898, which took effect on January 1, 1899, was passed, the law applicable to notes payable on demand was regulated by the St. of 1839, c. 121, which was retained in substance in the subsequent compilations of the statutes. Section 1

of this statute provided, in substance, that the maker should have the same defence against an indorsee as against a payee. Section 2 provided that, on any promissory note payable on demand made after the act took effect, a demand made at the expiration of sixty days from the date thereof without grace, or at any time within that term, should be deemed to be made within a reasonable time. Section 3 provided for the liability of indorsers.

Section 1 of this act was slightly changed by the St. of 1857, c. 192, but was revived, with an amendment by the St. of 1858, c. 70. And so it appears in the Gen. Sts. c. 53, § 10, and the Pub. Sts. c. 77, § 14. Sections 2 and 3 of the act appear in the Gen. Sts. c. 53, § 8, and the Pub. Sts. c. 77, § 12.

We have no doubt that the section of the Pub. Sts. c. 77, last mentioned has been repealed by § 197 of the St. of 1898, which provides: "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." We are therefore obliged to consider what is the law merchant, which was in force in this Commonwealth before the St. of 1839 took effect, and which is restored by the St. of 1898.

Before the St. of 1839, c. 121, was passed, the rule was well settled that as to a promissory note payable on demand, a demand in order to charge an indorser must be made within a reasonable time, and if no such demand was made, the note was considered as overdue and dishonored. This question arose also in another class of cases, namely, as to the length of time in which a note payable on demand, and remaining unpaid, would be held to be dishonored, and subject to the grounds of defence which would be open to the maker in a suit by the payee. See *Paine* v. *Central Vermont Railroad*, 118 U. S. 152, 160.

But while the general rule was well settled, there was found to be great difficulty in its application; and it was said to be impossible to fix any precise period, as each case depended upon its particular circumstances. Parker, C. J., in *Field* v. *Nickerson*, 13 Mass. 131, 137. In *Seaver* v. *Lincoln*, 21 Pick. 267, it was said by Chief Justice Shaw, "One of the most difficult questions presented for the decision of a court of law, is, what shall be deemed a reasonable time, within which to demand

payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another."

As to what has been held by this court to be a reasonable or unreasonable time, the cases are thus summed up by Mr. Justice Dewey, in *Ranger* v. *Cary*, 1 Met. 369, 374: "In *Field* v. *Nickerson*, 13 Mass. 131, the period of eight months was held not to be within a reasonable time to make a demand to charge the indorser; and in *Seaver* v. *Lincoln*, 21 Pick. 267, where the demand was made in seven days after the date of the note, it was held to be within due time. In *Sylvester* v. *Crapo*, 15 Pick. 92, a note that had remained unpaid for eleven months before it was negotiated, was held to be dishonored; and the shorter period of six months was, in *Thompson* v. *Hale*, 6 Pick. 259, held sufficient to subject it to the defence of a note overdue. On the other hand, a note indorsed seven days after its date was held, in *Thurston* v. *M'Kown*, 6 Mass. 428, to have been transferred in season to avoid any ground of defence arising from the equities between the original parties."

In *Ranger* v. *Cary* it was held that a note payable on demand was not to be regarded as overdue if indorsed within one month after its date.

The cases on this subject may be found collated in Norton's Handbook on Bills and Notes, (3d ed.) § 140, p. 347.

In the case before us no evidence was introduced of "the usage of trade or business, if any, with respect to such instruments," nor do the facts of the case appear apart from what the instrument itself shows.

We have no doubt that when the holder of such a note seeks to hold an indorser, the burden is on him to show that a demand was made upon the maker within a reasonable time; and that if there is any usage of trade or any fact or circumstance to excuse a delay, the burden is on him to show it. See *Keyes* v. *Fenstermaker*, 24 Cal. 329.

It is urged, however, that the court will take judicial notice of business in a community, including the universal practice of banks; and attention is called to the fact that in the charge to

the jury in *Field* v. *Nickerson*, 13 Mass. 131, 132, where the question was whether an action could be maintained by an indorsee against an indorser on a promissory note payable on demand, where the demand was made on the maker eight months after the date of the note, Chief Justice Parker, after stating to the jury that the demand must be made in a reasonable time, and that what was a reasonable time was a question of law in that case, further instructed the jury, "that, all the parties to the transaction living in a town where credit for loans of money among merchants is commonly given for thirty, sixty, or ninety days, the indorser must be considered as having contracted with reference to the usual period; that a delay of eight months was unreasonable. . . ." The jury were directed to return a verdict for the defendant. Nothing is said on this subject in the opinion. Whether or not an analogy can be drawn from the fact that in the business community the rate of credit may be thirty, sixty or ninety days, the St. of 1898, c. 533, § 193, as we already have pointed out, limits the question of usage to that of trade or business "with respect to such instruments." The statute took effect on January 1, 1899. All but one of the notes in suit were dated early in January of the next year. We are not aware that in the interval any usage of trade or business with respect to demand notes had grown up different from that which had had the force of law for nearly sixty years.

In a case like the present, in the absence of any evidence to bring the case within § 193 of the St. of 1898, we are of opinion that a demand on the maker should be made at or before the expiration of sixty days; that the demand in this case was not made within a reasonable time; and that the ruling requested should have been given.

Exceptions sustained.

J. Lowell, for the defendant.

E. A. Whitman, (*R. Walcott* with him,) for the plaintiff.

CASPER BERRY *vs.* EUGENE LEVITAN & another.

Suffolk. December 3, 1901. — March 3, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Mortgage, Of Chattels, Priority. *Assignment*, Equitable.

As between two mortgages of the same personal property executed on the same day, without delivery of the property, under St. 1883, c. 73, the one first recorded has priority, irrespective of the order of execution.

One who takes a mortgage of personal property without delivery of the property, in consideration of his lending the money to pay off a previous mortgage on the same property for the same amount, and receives a discharge of the previous mortgage just before his own mortgage is delivered to him, does not become thereby an equitable assignee of the previous mortgage, and his lien as against third persons begins when his own mortgage is recorded.

LATHROP, J. This is a bill in equity brought in the Superior Court against one Levitan and Charles C. Goodwin. The facts in the case are these. On March 3, 1896, Levitan, who was the owner of a stock of goods in a store, subject to a mortgage for $600 to one Harriet French, mortgaged the same to the plaintiff, and the mortgage was duly recorded. The goods remained in Levitan's store. The consideration of this mortgage was the sum of $600, which was paid by the plaintiff to Levitan for the purpose of paying the money to French and discharging her mortgage. This money was paid by Levitan to French, and she delivered to the plaintiff a discharge of her mortgage, just before the giving of the mortgage to the plaintiff.

Subsequently, on the same day, Levitan made a mortgage of the same goods to the defendant Goodwin. This mortgage covenanted that the goods were free from incumbrances, except a mortgage of $600 to Harriet French. This mortgage was put on record before the mortgage to the plaintiff; and Goodwin was not informed and did not know of the mortgage to the plaintiff.

On March 22, 1897, Goodwin took another mortgage from Levitan upon the same property. This mortgage was duly recorded on March 25, 1897, and did not set forth any prior

incumbrance. We do not understand, however, that this mortgage has any bearing on the questions before us.

On January 28, 1900, Goodwin took possession of the property, under the claim that he was the first mortgagee; and a few days later this bill was brought to prevent Goodwin from selling the goods under a power contained in his mortgage, and to have the plaintiff declared the first mortgagee.

Subsequently, the goods were sold by order of the Superior Court, and the net proceeds, which were insufficient to pay either mortgage in full, were ordered by a decree of the court to be paid over to the defendant Goodwin, he being adjudged the first mortgagee; and the bill was ordered to be dismissed as to Goodwin. The case is before us on an appeal from this decree.

The law in force when the mortgages were given is found in the St. of 1883, c. 73. Section 1 of this statute requires every mortgage of personal property to be recorded within fifteen days from the date written in such mortgage, unless it is required to be recorded in two places, when, if it is recorded in one place within the fifteen days, it may be recorded in the other place within ten days from the date of the first record.

Section 2 reads as follows: "Until a mortgage of personal property has been recorded as provided in the preceding section, it shall not be valid against any person other than the parties thereto, unless the mortgaged property is delivered to and retained by the mortgagee; and any record of a mortgage made subsequently to the times limited in said section shall be void and of no effect." This statute now appears in the R. L. c. 198, § 1.

Speaking of the St. of 1883, in *Drew* v. *Streeter*, 137 Mass. 460, 462, it was said by Chief Justice Morton: "Its purpose seems to have been to fix the date written in the mortgage as the date when the fifteen days should begin to run, and to make the provisions of the statute more clear and precise, and free from any question of construction like the one raised in the case at bar." The question before the court in that case arose under the Pub. Sts. c. 192, § 1, and was whether a mortgage, recorded within fifteen days, took precedence of an attachment of the goods covered by the mortgage, made after the mortgage

was executed but recorded before the mortgage was. It was held that the mortgage did not take precedence, on the ground that the registration did not relate back to the date of the mortgage so as to give it priority over intervening titles or liens.

By the express terms of the St. of 1883, a mortgage of personal property is not valid as against third persons until recorded. *Amerige* v. *Hussey*, 151 Mass. 300. In *Smith* v. *Howard*, 173 Mass. 88, it was held that an unrecorded agreement to give a chattel mortgage stood no better in equity than an unrecorded mortgage as against a purchaser of the goods.

If the mortgage to Goodwin had been made subject to the mortgage to the plaintiff and he had assumed and agreed to pay the same, Goodwin's mortgage might not take precedence of the plaintiff's mortgage. *Howard* v. *Chase*, 104 Mass. 249. *Pecker* v. *Silsby*, 123 Mass. 108. But the mortgage to Goodwin was not only not subject to the mortgage to the plaintiff, but it was not subject to the mortgage to French. The only reference to the latter mortgage is in the following clause: "And I hereby covenant with the grantee that I am the lawful owner of the said goods and chattels; that they are free from all incumbrances, except a mortgage to Harriet French of $600 assigned to John E. Ware; that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons." There is no clause by which Goodwin assumes and agrees to pay the mortgage to French, and Goodwin was not under any obligation to pay this mortgage. *Estabrook* v. *Smith*, 6 Gray, 572. *Ayer* v. *Philadelphia & Boston Face Brick Co.* 157 Mass. 57.

It is suggested that as the consideration of the plaintiff's mortgage was the payment by him to Levitan of $600 for the purpose of paying this sum to French, and discharging a mortgage which French had upon the goods, and as Levitan did pay this sum to French, and French delivered to the plaintiff a discharge of the mortgage just prior to the giving of the mortgage by Levitan to the plaintiff, this discharge may be considered as an assignment to the plaintiff of the mortgage to French. But as was said in *Smith* v. *Howard*, *ubi supra*, "the equitable interest must follow the contract upon which it is

founded." That contract, as we have seen, is a mortgage not recorded until after the plaintiff's mortgage, and, by the express terms of the statute it is not valid until recorded. We are therefore of opinion that the decree of the Superior Court was correct.

Decree affirmed.

W. A. Buie, for the plaintiff.
E. Levitan, pro se.
O. B. Mowry, for the defendant Goodwin.

PHILIP G. PEABODY *vs.* BOSTON AND PROVIDENCE RAILROAD CORPORATION.

Suffolk. January 14, 1902. — March 3, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Statute, Construction. *Boston and Providence Railroad Corporation. Words*, "Lay out." *Estoppel*, By conduct.

Under St. 1896, c. 516, §§ 18–20, the approaches to the station, which the Boston and Providence Railroad Corporation was authorized to build at the corner of Dartmouth and Buckingham Streets in Boston, were to be constructed by the city of Boston, except those approaches upon the land of the railroad company, which that company was to construct under § 19. Therefore a change of the grade of Buckingham Street by that company was unauthorized, and the remedy of one whose land was injured thereby is by an action of tort and not by a petition for damages under the statute.

In the provision of St. 1896, c. 516, § 20, that the street commissioners of Boston shall "lay out" suitable approaches to the station authorized by that statute to be built by the Boston and Providence Railroad Corporation, the words "lay out" are not used in their technical sense of laying out a way, but in a more general sense, including any alteration, relocation or repairs of existing ways necessary to connect the property of the railroad company with the streets of Boston.

A railroad company is not estopped to assert that in changing the grade of a certain public street it acted wholly without authority.

PETITION, filed December 21, 1899, and amended January 17, 1901, to the Superior Court under St. 1896, c. 516, § 23, for damages to property of the petitioner by the respondent's changing the grade of Buckingham Street in Boston in connection with its construction of the Back Bay station in that city.

The original petition alleged a filing on March 17, 1898, by the respondent of a location of its taking under the act. The amended petition alleged the location for the extension of the railroad on March 17, 1898, and a location of land for the construction of the station on December 30, 1897, and alleged the raising of the grade of Buckingham Street in front of the petitioner's land. The answer alleged that the petitioner ought not to maintain his petition because it was not brought within one year after the filing of the location, in accordance with the provisions of the acts under which he claimed damages.

St. 1899, c. 386, extended the time for filing petitions for damages from a change of grade occasioned by the location and construction of any railroad by any railroad company other than the terminal company under St. 1896, c. 516, as provided for in § 23 of that chapter, to the first day of January, 1900.

At the trial in the Superior Court before *Hardy*, J., the respondent asked the judge to rule, that the petition could not be maintained, because it was filed more than one year after either of the locations was filed; that the act of 1899, extending the time for filing petitions, did not apply to and cover the case of the petitioner; that the act of 1899, if it applied to this petition, was unconstitutional within the provisions of the Constitution of the Commonwealth and of the Constitution of the United States, because it removed the bar of the statute of limitations after the period of limitation had expired; and that upon the whole evidence the petitioner could not recover. The judge refused to make any of these rulings.

The case was then submitted to the jury, who assessed damages in the sum of $1,683, under instructions as to the rule of damages which were satisfactory to the parties; and, by agreement of the parties, the judge reported the case for the consideration of this court.

F. T. Benner, for the petitioner.

J. H. Benton, Jr., for the respondent.

LORING, J. This is a petition for compensation for damages caused to the petitioner by the change in grade of Buckingham Street in front of the petitioner's house and land abutting on the southerly side of that street. The petition is brought against the respondent railroad on the ground that, by force of

the plans prepared by it and approved by the mayor of the city of Boston and the railroad commissioners, it acquired the right, under St. 1896, c. 516, to make the change in grade which it made, and if not, that it is estopped to set up its own wrong.

We are of opinion that on the facts stated in the report the petitioner has mistaken his remedy and that he should have brought an action of tort.

St. 1896, c. 516, provided for a union station on the south side of the city of Boston; § 19 of the act provided that within six months after the new terminal company filed a location for the south union station, the respondent corporation should prepare plans for a passenger station as a substitute for its Park Square station, and submit them first to the mayor of Boston and, after they had been approved by him, to the railroad commissioners. The plans were to be "plans and specifications for the construction of a passenger station and approaches thereto and facilities for passengers and public accommodation" as a substitute for the Park Square station, and were to show, among other things, the location of the station with reference to the adjacent streets.

By the preceding section (§ 18), the land was described which could be taken in whole or part for this station; it was bounded on the south by the northerly side of Buckingham Street. This section also provided that in addition to the land described the respondent corporation might take "any other land adjacent thereto, within such limits as the board of railroad commissioners may upon hearing in writing prescribe."

Section 19 further provides that after the plans are approved "Said station, approaches and facilities shall be constructed and provided" by the respondent corporation, "according to the plans thus approved." Section 20 provides that "the board of street commissioners of the city of Boston shall lay out, and said city shall construct, suitable approaches to said station or stations to be constructed near Dartmouth street, in such directions and at such grades as said board shall deem the public convenience and necessity require, and as the mayor of said city shall approve."

The respondent prepared plans for the construction of a station, as provided in the act, which were approved by the mayor of Boston and on November 1, 1897, by the board of railroad

commissioners. These plans showed a railroad station abutting on the northerly side of Buckingham Street. The grade of the floor of the new station is stated on the plans, and it is stated in the report that this grade is "about six feet above the then grade of the easterly end of" that street. But there is nothing on the plans to indicate that fact. The plans provided for an entrance at the easterly end of the station, and this entrance is delineated on the plan as opening on to Clarendon Street extension. The land shown on this plan as Clarendon Street extension was not then laid out as a street and never has been laid out as a street, and was subsequently taken from its owner in fee by the respondent corporation, being included in the parcel taken by it under St. 1896, c. 516, § 18, as a location for the station in question.

The land taken by the respondent for this station was taken on December 30, 1897, and included all the land bounded on the north by the tracks of the Boston and Albany Railroad, on the east by Columbus Avenue, on the south by Buckingham Street, and on the west by Dartmouth Street.

Subsequently, in June, 1899, the railroad entered upon the land taken for the purpose of constructing its station and, so far as it appears, without further authority, constructed an approach to the easterly entrance of its station over Buckingham Street; and for that purpose widened that street and raised its grade. It appears from the plan that the petitioner's house is one hundred and eighty-five feet from the easterly bend or corner of the street. In making this change the grade of Buckingham Street in front of, abutting upon, and adjacent to the petitioner's premises was changed and the "sidewalk and street in front of and abutting upon the said premises upon the westerly side was raised two feet, and thence ascended regularly towards the easterly line of the premises where the grade was raised three feet."

It is stated in the report that "in order to provide a suitable and proper carriage entrance to the easterly end of said station, and in order to provide sufficient head-room for said railroad, Buckingham Street was raised by the defendant in grade in front of, abutting upon, and adjacent to the plaintiff's premises." But it is also stated in the report that the order made by the

board of aldermen, acting as county commissioners of the county of Suffolk, prescribing the manner in which the extension of the respondent's railroad to the terminal company's grounds should cross the highways "did not prescribe any change of Buckingham Street at the easterly end thereof, or of any portion of said street abutting upon the estate of the petitioner, which estate was upon the southerly side of Buckingham Street at the easterly end thereof." It is also stated in the report that the house and land of the petitioner was "on the southerly side of Buckingham Street at a short distance westerly from its junction with Columbus Avenue." We understand that the change in grade made under the order of the board of aldermen should be laid out of the case, and the rights of the parties stand upon the change of grade made without regard to that order.

The respondent's contention before us is that it had no authority to change the grade in Buckingham Street; that the approaches which, by § 19, it was to construct were the approaches on its own land, and shown on the plans prepared by it and approved by the mayor of Boston and by the board of railroad commissioners; that the approach to the station by way of public streets was covered by § 20 and that those approaches were to be constructed by the city of Boston "at such grades as said Board [of street commissioners of the city of Boston] shall deem the public convenience and necessity require, and as the mayor of said city shall approve."

There is no statement in the report explaining why the proposed extension of Clarendon Street was not constructed, or why the railroad did not construct an approach to the easterly entrance of its station over the land, which was to be covered by the extension of Clarendon Street and which had, after the plan for its station was approved and before the approach over Buckingham Street was constructed, been taken by it in fee; or how it happened that the respondent railroad corporation undertook and was allowed, not only to raise the grade of Buckingham Street, which was a public way, but also to enlarge it by adding twenty feet to its width. On the report it must be taken that this was done by the respondent without further authority.

The petitioner's answer to the respondent's contention that the

approaches on its own land were to be made by and at the expense of the respondent, and those by way of public streets were to be constructed by the city under § 20, is that that section applies to the laying out of new streets and not to reconstructing streets already laid out in order to make them suitable as approaches to the new station. But we think that that is too narrow a construction of the section.

The provision of § 20 is not that the street commissioners shall lay out such new streets as are necessary, but it is that they shall "lay out" "suitable approaches." We are of opinion that the words "lay out" in this connection are not used in their technical sense of laying out a way, but in the more general sense of making it the duty of the street commissioners to prescribe any changes that might be necessary in the public streets to connect the private property of the respondent railroad with the streets of Boston, including what would ordinarily be done by laying out a new way or altering relocating or directing specific repairs upon an existing way.

The language of the section is loose, but it is not to be lightly presumed that the Legislature intended to give to a railroad a roving commission to change the grades of the public streets, without the sanction of any public authorities; and this construction is confirmed by the fact that § 19 provides that the approaches shown on the respondent's plan shall be constructed by them, that is to say, approaches on its own land are to be made by the railroad and approaches by way of public streets are to be left to the control of the street commissioners of the city and to be constructed at their expense. In this case, the respondent presented a plan showing as an approach a proposed street called on the plan Clarendon Street extension; so that, on the plan which was approved, no approach, to be constructed by it under § 19, was shown.

The petitioner's second answer to this contention is, that the respondent is estopped to set up its own wrong, and the case of *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107, is relied upon as an authority to that effect. The decision in that case was put upon the ground that the railroad had a right to construct the approaches to the overhead bridge under the statutes then in force, after notice to the selectmen of their intention so to do,

not objected to by them. It is settled that where a corporation has the right to condemn property and proceeds as if it had condemned it, it is estopped to set up in a petition for compensation that it has not complied with the formalities prescribed for a technical taking. *Lewis* v. *Boston*, 130 Mass. 339. *Spaulding* v. *Arlington*, 126 Mass. 492, 494. *Lexington Print Works* v. *Canton*, 171 Mass. 414, 415. *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365.

But where the act done by the respondent, for which compensation is sought, is outside of the acts, which the respondent can entitle itself to do by any act of condemnation, the petitioner's remedy is by an action of tort, and the respondent is not estopped to set up that defence if a petition for compensation is brought against it.

We are of opinion that the jury should have been instructed that upon the whole evidence the petitioner could not recover.

Although this case comes here by report, we think that the entry should be

New trial granted.

EDWARD O. COOKE *vs.* ROSCOE M. PLAISTED.

Suffolk. January 14, 1902. — March 7, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Evidence, Relevancy and materiality, to show fraud. *Bankruptcy. Practice, Civil*, Verdict.

In an action by an attorney at law on an account annexed for a balance alleged to be due him upon a bill for professional services, the defendant filed a declaration in set-off. To this the plaintiff pleaded in bar a discharge in bankruptcy. The defendant filed an answer to the plea in bar, alleging, that the discharge of the plaintiff was not a bar to the defendant's claim as the plaintiff's indebtedness to the defendant was created by the plaintiff's fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. It appeared, that the plaintiff had been one of two trustees for the benefit of the defendant's creditors. The defendant offered to show that the trustees received about $12,000 from assets assigned to them, that they paid creditors only about $2,400 and that the plaintiff's co-trustee charged $3,000 for his services, the charge being known to the plaintiff. The evidence was excluded. *Held*, that the exclusion was right, as the evidence had no tendency to prove the allegations of the answer to the plea of discharge. *Also*, the defendant offered in

evidence the record in the case of *Cooke* v. *Barrett* reported in 155 Mass. 418, a suit in equity in which the plaintiff failed by reason of laches. The evidence was excluded. *Held*, that the exclusion was right, as the plaintiff's failure in that suit had no tendency to show that his indebtedness to the defendant was created by fraud in the manner alleged. *Held, also*, that evidence of an overcharge and of a sum of money received and not accounted for, neither of which were alleged in the declaration in set-off, rightly was excluded. *Held, also*, that evidence, tending to show the plaintiff's connection with the adoption by the defendant of a person as his child in order to obtain a bequest, and of a will of the defendant made in favor of the plaintiff, was immaterial to the issue and excluded rightly. *Also*, it appeared, that at one time the plaintiff attempted to discontinue this action and brought another action against the defendant on a promissory note for $1,500 which he alleged had been given by the defendant in settlement of this action. The jury found in that case that the note was not given in settlement of this action and the defendant had judgment. *Held*, that the record of the other action was immaterial and properly was excluded.

Where a discharge in bankruptcy is pleaded in bar to a claim made up of many items, and an answer to the plea alleges that the discharge is not a bar to the claim because the indebtedness was created by fraud of the bankrupt while acting in a fiduciary capacity, and it appears, that some of the items in the account were created by such fraud and some were not, and a jury gives a general verdict for a part of the claim only, there being nothing to show what items were included in the verdict, a judgment on the verdict is barred by the discharge.

CONTRACT on an account annexed as stated by the court, the case at a previous stage being reported in 176 Mass. 374. Writ dated January 13, 1893.

The last trial in the Superior Court was before *Hardy*, J., who ordered a formal verdict sustaining the plaintiff's plea alleging his discharge in bankruptcy in bar of the defendant's declaration in set-off; and the defendant alleged exceptions.

The United States bankruptcy act of 1898, § 17, cl. 4, provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

W. P. Hale, for the defendant.

H. H. Pratt, for the plaintiff, submitted a brief.

BARKER, J. This suit was brought to recover upon an account annexed an alleged balance of $2,681.21 upon a bill for professional services as an attorney at law alleged to amount to $6,023.53 on which was credited in the account, in a number of items, sums received by the plaintiff amounting to $3,342.32. The defendant besides filing an answer contesting the plaintiff's

demand filed a declaration in set-off alleging that the plaintiff owed him the sum of $3,342.32 of which the schedule of credits in the plaintiff's account annexed was alleged to be an itemized statement, with the further sum of $1,000 for money had and received by the plaintiff to the defendant's use, with interest thereon from a date alleged, and further that the plaintiff owed him interest from the same date upon the sum of $1,350 part of the $3,342.32 at the rate of thirty per cent per annum under a statute giving that rate of interest upon money collected by an attorney and not paid over upon request, and also, by amendment the further sum of $356.25 for money had and received by the plaintiff to the defendant's use.

The defendant's answer alleged that in the year 1889 the defendant constituted the plaintiff and one Fowle trustees of the plaintiff's property for the benefit of the plaintiff's creditors and of himself, and that the plaintiff agreed that his compensation for services as a trustee should be only $200, and that some of the charges were for services as trustee in excess of the amount agreed upon; that others were for services rendered to others than the defendant; that some were rendered upon the understanding that they were to be paid only if the suits in which they were rendered were successful, and that the suits were unsuccessful; and the answer also alleged payment in full.

There was also an answer in recoupment alleging that the defendant was induced to make the trust assignment of 1889 by wrongful advice given to him by the plaintiff with the fraudulent intent to deprive the defendant of his entire property, and that the plaintiff managed the trust property so negligently and carelessly that his services were worthless and the defendant put to delay and expense for which he asked to recoup the sum of $10,000 as damages.

The case went to an auditor who found for the defendant on the plaintiff's account and for the defendant in the sum of $8.06 on the declaration in set-off, and who also made special findings that there was no evidence before him to support a charge of fraud on the part of the plaintiff, nor any evidence to entitle the defendant to a recoupment, or to the sum of $1,000 alleged in the declaration in set-off or to thirty per cent interest. It appears further from these special findings of the auditor that he

disallowed upwards of $1,800 of the plaintiff's charges for services as an attorney at law.

After the filing of the auditor's report the case went to a jury and resulted in a verdict for the defendant in set-off for the sum of $1,482.25. Exceptions taken by the plaintiff at the trial in which this verdict was rendered were overruled by this court in *Cooke* v. *Plaisted*, 176 Mass. 374. The plaintiff then filed a petition in bankruptcy and on April 8, 1901, obtained his discharge, which he pleaded in this action on April 22, 1901. In the meantime a judgment seems to have been entered on the verdict in favor of the defendant on the set-off, and the plea alleged that the plaintiff ought not to be further held to answer the judgment.

The defendant answered denying the discharge and also alleging that it was inoperative against the defendant's claim because that was an indebtedness created by fraud of the plaintiff against the defendant, and further that the defendant's claim was an indebtedness created by the plaintiff's fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. Thereupon the case was sent to another auditor under a rule to find and report the facts relating to the plaintiff's plea in bar and to the defendant's answer thereto. This auditor reported that at the hearing before him the defendant contended that the discharge did not relieve the plaintiff of his liability upon the judgment because the indebtedness which had been reduced to judgment had been created by the fraud, embezzlement, misapplication or defalcation of the plaintiff while acting as a trustee under the assignment of 1889. The auditor found that such an assignment had been made to the plaintiff and Fowle; that the trustees came into possession of several thousand dollars under the assignment and paid all creditors; that the plaintiff acted as attorney for the defendant as well as trustee and received and credited on account of his services as attorney from time to time, while he was acting as such trustee the amounts credited to the defendant in the plaintiff's declaration and claimed in the declaration in set-off; that these amounts were received from the assets of the trust by the plaintiff either by checks against the trust deposit or in settlement of collections or suits in which he represented the trustees

as attorney, and that, in some instances certainly the defendant knew that these amounts had been received by the plaintiff. Also that the defendant contended before the auditor that these facts established a fraud or misapplication of one acting in a fiduciary capacity within the meaning of the bankruptcy act. Also that so far as the question before the auditor was one of fact he found that there was no fraud, misapplication, embezzlement or defalcation, and that so far as the question was one of law the auditor reported it for the decision of the court, and lastly that the judgment had been assigned after verdict to a third party.

After this auditor's report had been filed the case went to trial before a jury upon the issues raised by the plea of the discharge in bankruptcy and the answer thereto, and we now have to consider the exceptions taken by the defendant at that trial the court having directed the jury to render a verdict in favor of the plaintiff. At this trial the plaintiff put in evidence the second auditor's report and rested. The defendant's evidence tended to show that the assignment in trust of 1889 covered all his property except personal ornaments and wearing apparel; that all the money credited by the plaintiff in the account came from the trust fund; that the plaintiff drew the deed of assignment and acted as a trustee under it, and that when it was made he agreed to do all the work required under it for the compensation of $200 unless the defendant should be forced into insolvency in which event the plaintiff was to have $100 more.

The defendant's evidence also tended to show that he was in a weak mental condition and incompetent to transact business when the assignment of 1889 was made. The other evidence admitted tended to show that the plaintiff had collected for the defendant sums not credited in his account, that the charges for services and expenses stated in the plaintiff's account were either untrue, were in excess of what the plaintiff had agreed that his compensation should be or were for services not in fact rendered for the defendant, or for expenses to which he never had assented and ought not to pay, or for matters in proceedings against his interest. Also that with reference to the charges in connection with one equity suit the plaintiff had proposed to the defendant that the latter should make up a bill of twice the

amount and collect it of his father's estate and divide the proceeds with the plaintiff, or that the defendant should break his mother's will and sue for one half of the assets of the partnership which had once existed between his father and himself. Most of this evidence was contradicted by the testimony of the plaintiff.

At the close of the evidence a verdict for the plaintiff was ordered, against the defendant's exception. His other exceptions are to the exclusion of evidence.

The first two of the latter class are to the exclusion of evidence that the trustees received about $12,000 from the assigned assets and that they paid creditors only about $2,400 and that the plaintiff's co-trustee charged $3,000 for his services, the charge being known to the plaintiff. This evidence had no tendency to prove the allegations of the answer to the plea of the discharge and was excluded rightly.

The record of the action reported as *Cooke* v. *Barrett*, 155 Mass. 413, was rightly excluded because the failure of the plaintiff to succeed in that litigation had no tendency to show that his indebtedness to the defendant was created by fraud in the manner alleged in the answer.

The witness Knapp was properly prevented from testifying that he received less than the sum charged as paid to him by the plaintiff for serving a process, because the defendant did not contend that he had sought to recover that sum in his declaration in set-off.

One of the credit items was in amount $39.68, and the plaintiff testified that it represented the difference between a sum of $1,200 received by him from the trust to take up two notes and the sum of $1,160.32 which he paid out therefor. This item of $39.68 was one of those in the declaration in set-off. The defendant offered to prove that the plaintiff paid in settlement of the notes twenty per cent less than $1,160.32, and the evidence was excluded and an exception taken. Assuming that the evidence would have shown that besides the $39.68, over $200 more of the $1,200 received by the plaintiff to pay the notes was not used by him for that purpose, no part of the $1,200 except the $39.68 could have been included in the verdict on the declaration in set-off, and whether he owed the defendant the additional

sum because of a fraud not affecting the set-off was immaterial to the issue upon trial.

The evidence tending to prove the plaintiff's connection with the adoption by the defendant of another person as his child in order to secure a bequest in the will of the defendant's mother, and that with reference to a will of the defendant made in favor of the plaintiff was all immaterial to the issues upon trial and was excluded rightly.

At one time the plaintiff attempted to discontinue this action and thereafter he brought another action against the defendant upon a promissory note for $1,500 which he alleged had been given by the defendant in settlement of this action. In the second action the jury found that the $1,500 note was not given in settlement of this action and the defendant had judgment. The record of the second action was offered in evidence and excluded subject to the defendant's exception. We think this evidence immaterial also.

There seems to be an insuperable difficulty with the defendant's case, so far as his contention that the discharge in bankruptcy is not operative against his judgment is concerned, and this difficulty lies in the fact that it is impossible to say upon what items or specific cause or causes of action the verdict upon the declaration in set-off was rendered. The whole sum alleged by that declaration to be due from the plaintiff to the defendant including the interest alleged to be due upon principal amounted at the time when the verdict was rendered to more than $7,000. The verdict was for $1,482.25 only. If we assume as the evidence tended to show that the sums credited to the defendant by the plaintiff in the account annexed to the plaintiff's declaration and amounting to $3,342.32 were received by the plaintiff from the trust property, still it cannot be known upon which of the items making up that sum the verdict in set-off was founded, nor can it be asserted or shown that any considerable part of the verdict, if any part of it, was founded upon the sums received by the plaintiff from the trust and credited in his account annexed. Besides declaring for the credit items amounting to $3,342.32 the declaration in set-off alleges that the plaintiff owes him for money had and received to the defendant's use further and additional sums of $1,000, $200, $36.25, and $100,

with interest from April 19, 1893, and there is no allegation that these sums were connected with the trust. With interest from the date alleged they amount to nearly if not quite the amount of the verdict. Besides this there are quite considerable amounts in the credit items, like the payment of the agreed compensation of $100 for services as trustee and of $25 for services in the matter of the application of the defendant's wife for separate support, which the defendant does not contend were obtained by fraud. There is therefore in the nature of things no way of showing that the verdict in set-off represented trust property alone, nor any way of showing that it was made up alone of indebtedness created by the fraud, embezzlement, misappropriation or defalcation of the plaintiff while acting as trustee. But unless the verdict was for such demands only the defendant having put his demand in such shape that the part of it not barred by the discharge is indistinguishably mingled with other demands not of that nature and as to which the discharge is a bar, was not entitled to a verdict in his favor either upon the evidence as it stood or as it would have been if all the evidence excluded against his exception had been admitted. There being no dispute that the discharge had been granted, unless upon the evidence the jury could do more than to conjecture that the verdict in set-off was for indebtedness created by the plaintiff's fraud they were rightly ordered to find a verdict for the plaintiff upon the issue before them.

Exceptions overruled.

JOHN BOWES *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Worcester. January 14, 1902. — March 7, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Negligence, On railroad, Contributory, Employers' liability, assumption of risk. *Practice, Civil*, Exceptions.

For the conductor in charge of a freight train to order a brakeman to go between two of the cars to put in order a defective coupling and then to start the train

without giving him any warning, is negligence, for which the railroad company is liable if the brakeman in consequence is caught between the cars and injured.

A brakeman ordered by the conductor in charge of a freight train to go between two of the cars and put in order a defective coupling on one of them, which had to be fitted before the cars could be coupled, does not assume the risk of the train starting while he is there, and is in the exercise of due care in remaining at his post engaged in the work which he was bidden to do.

In an action by a brakeman for injuries caused by the plaintiff being caught between two cars of a freight train of the defendant, by the train being started while the plaintiff, by order of the conductor in charge of the train, was engaged in putting in order a defective coupling on one of the cars, the plaintiff elected to go to the jury upon a count which alleged that the plaintiff was injured "by reason of the negligence of some person in the service of the defendant, who had charge or control of a train upon the railroad of the defendant"; and the judge ordered a verdict for the defendant on a count which alleged, that the plaintiff was injured "by reason of the negligence of some person in the service of the defendant, who had charge or control of a locomotive engine upon the railroad of the defendant," but refused to give a ruling that there was "no evidence of any negligence of the engineer causing the accident." The plaintiff had a verdict. The evidence showed, that the plaintiff was in the exercise of due care and did not assume the risk of the accident which happened to him and that the conductor was negligent, but there was no evidence of negligence on the part of the engineer. *Held*, that exceptions by the defendant must be sustained, as the defendant had a right to the express ruling that there was no evidence of negligence on the part of the engineer.

TORT by a brakeman for injuries received in the defendant's freight yard at Worcester by a freight train starting while the plaintiff by order of the conductor of the train was between two of the cars putting in order a coupling on one of them. Writ dated June 30, 1900.

The first count of the declaration alleged, that the plaintiff was injured "by reason of the negligence of some person in the service of the defendant, who had charge or control of a train upon the railroad of the defendant." The second count alleged, that he was injured "by reason of the negligence of some person in the service of the defendant, who had charge or control of a locomotive engine upon the railroad of the defendant."

At the trial in the Superior Court before *Fox*, J., at the close of the evidence, the plaintiff elected to go to the jury on the first count. The plaintiff's counsel argued to the jury, that the plaintiff was entitled to a verdict if the engineer was negligent, on the ground that the engineer was the person in charge or control of the train.

The defendant asked the judge to give the following instruc-

tions: 1, there was no sufficient evidence to warrant a verdict for the plaintiff on the pleadings and evidence in this case; 2, that there was no evidence of any negligence of the conductor causing the accident; 3, that there was no evidence of any negligence of the engineer causing the accident; 4, that the only person whose negligence was material upon the count elected by the plaintiff, and upon the evidence in the case, was the conductor.

The judge refused to give these rulings, but upon the matters involved in the fourth request, ruled as follows: "The plaintiff has elected to go to the jury upon the first count, which, in substance, charges the neglect of the person in charge of the train. You, therefore, will bring in a verdict for the defendant on the second count, which charges neglect upon the engineer, in substance, in any event. If you find for the plaintiff, you will find for the plaintiff only on the first count."

The jury returned a verdict for the plaintiff on the first count in the sum of $2,500; and the defendant alleged exceptions.

W. C. Mellish, for the defendant.

H. Parker, for the plaintiff.

BARKER, J. 1. The refusal to rule that there was no sufficient evidence to warrant a verdict for the plaintiff was right.

The uncontradicted evidence was that the conductor was in charge of the train and gave the signal in obedience to which the train was pushed forward and the cars between which the plaintiff was at work brought in contact. There was evidence tending to show that shortly before the conductor gave the signal he had ordered the plaintiff to go to the place where he was hurt, not for the purpose of coupling the two cars when they should be brought together, but for the purpose of fixing a defective coupling, and that the conductor knew or had good reason to know that the plaintiff was still between the two cars and engaged in fixing the coupling, and that the conductor gave the plaintiff no warning that the cars were about to be brought together. From this it fairly could be found that the conductor was negligent in giving the signal for the train to move and that the plaintiff was in the exercise of due care in remaining at his post engaged in the work which he had been bidden to do. If he had gone between the cars merely to couple them

when they should be brought into contact, the risk of doing that would have been one of the ordinary risks of his employment, which he assumed, and in that case it would have been his duty to look out for himself and he would not have been entitled to expect any warning that the cars were about to be brought together. But when he was ordered by the conductor in charge of the train to fix a defective coupling, which must be fixed before the cars could be coupled, he had a right to expect that at least unless he should be given warning the cars would not be moved while he was between them at work, and he could be found not to have accepted the risk that they should so be brought together.

2. We think that the jury should have been instructed that there was no evidence of any negligence of the engineer, and that the only person whose negligence was material upon the first count, upon which alone the case went to the jury, was the conductor. Probably the presiding judge thought that it was made clear to the jury that they could not give a verdict for the plaintiff by reason of negligence on the part of the engineer by the direction to bring in a verdict for the defendant on the second count which in substance charged neglect upon the engineer. But the second count did not in terms charge negligence upon the engineer, but upon "some person in the service of the defendant, who had charge or control of a locomotive engine upon the railroad of the defendant," and the first count did not in terms charge negligence upon the conductor but upon "some person in the service of the defendant, who had charge or control of a train upon the railroad of the defendant." There was not in fact any evidence of negligence on the part of the engineer. It is plain upon the evidence that he neither knew nor could have known of any reason why he should not obey the signals transmitted to him in due course as orders, and that all that he did was to obey them in a proper manner. Nor was there any evidence that the train was in charge or control of the engineer or of any other person than the conductor. As the case stood after the election of the plaintiff to rely only on the first count we think the defendant was entitled to have the issues as to the negligence of the engineer clearly eliminated from the case by the instructions requested, and that the statement of the pre-

siding judge with reference to their action upon the two counts was not a sufficient compliance with the requests.

Exceptions sustained.

HANNAH M. DRESSER & others, executors, *vs.* HENRY C. DRESSER & others.

Worcester. January 15, 1902. — March 7, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Will, Undue influence.

There may be found to have been undue influence invalidating a will, although the will was prepared, in the absence of the person alleged to have exercised the undue influence, by the usual counsel of the testator at the counsel's office from a draft brought there by the testator himself and from oral instructions then given by the testator and was then and there executed.

On the issue, sent to be tried in the Superior Court, whether a certain testator was induced to execute the instrument purporting to be his will by the undue influence of his third wife, it appeared, that the testator died in 1899 when nearly eighty-one years of age. The instrument was executed in 1895. In 1873 he married the wife who survived him. In 1882 he had made a will by which his eldest son by a former marriage shared equally with his wife and two other children the residue of his estate, except that an indebtedness of about $14,000 due from his eldest son was to be applied as a portion of his share. The eldest son and the wife were named as executors. In the instrument of 1895, the principal changes were, that the eldest son was given but one dollar and released from all obligations to his father, that the residuary estate was given to the wife and the other two children, with a limitation excluding the children of the eldest son if the legatees should not survive the testator, and that the eldest son was not named as an executor. The eldest son had lived in the South until 1884 when he returned to his former residence here. The instrument of 1895 was prepared by the usual counsel of the testator at the counsel's office from a draft brought there by the testator and from oral instructions there given by the testator where also the instrument was executed. For many years the attitude of the testator's wife toward his eldest son had been hostile. She testified, that the hostility came on gradually, and that there came a time when she determined that family visits and communications with him should cease. There was evidence tending to show, that the esteem and affection of the testator for his eldest son continued strong and unchanged and that he was deeply and constantly pained by the attitude of his wife, that the testator against his own wish declined to visit the son's house or to have the son at his house, and when in the presence of his wife omitted to recognize his son in the street, although when without his wife he so recognized him and entered into conversation with him when they met. There also was evidence tending to show, that the wife knew the contents of the will of 1882, that she saw the draft from which the

instrument of 1895 was made before the testator took it to his counsel, and that she made to her husband the suggestion which resulted in the dropping of the eldest son as one of the executors. *Held*, that on this evidence, the judge was warranted in submitting the issue to the jury, and the jury were warranted in finding that a domination amounting to undue influence was established over the testator by his wife and was exercised against the interest of his eldest son, and in answering the issue in the affirmative.

ISSUES framed by a justice of this court in a probate appeal and sent to the Superior Court to be tried by a jury.

The issues framed for the jury were as follows:

"First issue. Was the instrument propounded as the last will and testament of Chester A. Dresser, duly executed in accordance with law?

"Second issue. Is the said instrument the will of said Chester A. Dresser, and did he, at the time of its execution, understand its contents?

"Third issue. Was the said Chester A. Dresser induced to execute the said instrument through [duress, or] undue influence exercised upon him by Hannah M. Dresser, or any other person?"

At the trial of the issues in the Superior Court before *Bell*, J., by order of the judge and with the agreement of the contestants, the first two issues were answered in the affirmative, and the third issue was tried, the words "duress or" being stricken from it.

At the close of the evidence, the executors, among other requests, asked the judge to rule that there was no evidence to warrant a verdict for the contestants on the third issue. The judge refused so to rule. On that issue the contestants presented their case to the jury on the question, whether the instrument was procured by the undue influence of Hannah M. Dresser. They did not contend that it was procured by the undue influence of any other person.

The jury answered the third issue in the affirmative; and the executors alleged exceptions, only one of which was argued.

J. M. Cochran & T. G. Kent, for the executors.

H. Parker, (*H. B. Montague* with him,) for the contestants.

BARKER, J. This case is before the full court upon exceptions taken by the executors at a trial by jury at the bar of the Superior Court of issues as to an instrument purporting to be a will, proceedings for the probate of which are pending in the Supreme

Judicial Court for the county of Worcester. At the trial the only contested issue was whether the testator was induced to execute the instrument through undue influence exercised upon him by his wife, and the verdict upon this issue was in the affirmative. The exceptions taken at the trial were to the admission of certain testimony, and these are not now pressed, and to the omission to give certain instructions in the charge and to the charge so far as it differed from the requests for instructions. At the argument before us the only contention made by the executors was that the judge erred in declining to take the case from the jury upon the contested issue upon the ground that there was no evidence to warrant a verdict for the contestants. Hence we consider only that question.

The testator died on August 31, 1899, when nearly eighty-one years of age. The instrument propounded as his will was executed on July 15, 1895, when he was in his seventy-sixth year. He was a cotton manufacturer and attended to his business up to the day of his death. His only ailment seems to have been a chronic neuralgia. At the time of his death the value of his property as estimated by one of the persons named as executor was $150,000 and as estimated by another person also so named was $175,000, and he seems to have been for many years possessed of a competency. In 1873, having been twice married, he was married to his present widow. At that time he had three children, two sons and a daughter. The woman he then married had one son then nineteen years old.

Before 1882 he had made a will as to the provisions of which the evidence gives little information, except that it contained a public bequest. On January 21, 1882, he made a second will which was in evidence. This will gave his wife the sum of $35,000, the use of his homestead for life, his household furniture and other things of that general nature, and gave to his wife's son in a certain contingency what he considered as an equivalent for the money brought him by his wife, and made his wife and his three children his residuary legatees equally, the issue of any child who might be dead at his decease to take by right of representation, but providing that an indebtedness of some $14,000 due from his eldest son should be applied as a portion of his interest. The eldest son and wife were named as

executors. The principal changes in the disposition of his property by the instrument of July 15, 1895, were that the eldest son was given but $1 and released from all obligations to his father, that the residuary estate was given to the wife and the other son and daughter only, with a limitation under which the children of the eldest son could not have any share in the residue if the residuary legatees should not survive the testator, and that the eldest son was not named as an executor.

The eldest son was married in 1869, and for fifteen years from that time lived in the South, returning to his former residence here in 1884, and dying late in the year 1895, leaving a widow, four sons and one daughter, of whom but one was then of age.

The instrument of July 15, 1895, was prepared for execution by an attorney at law who was the usual counsel of the testator, from a draft brought by him to the attorney and from oral instructions given in consultation with the attorney at his office, and was there executed. There was no claim that the instrument was procured by undue influence on the part of the attorney.

It was practically conceded at the trial that for many years the attitude of the testator's wife towards his eldest son had been hostile. She herself testified that it was disagreeable and that she could not tell whether it existed in 1882, that it came on gradually, and that there came a time when she determined that family visits and communications with him should cease, and that there were a number of causes of which she would rather not speak unless obliged to.

On the other hand there was abundant evidence tending to show that the esteem and affection of the father for this son continued strong and unchanged and that the father was deeply and constantly pained by the attitude of his wife.

Examining the evidence in the light of these circumstances, all of which might have been found by the jury, and which do not seem from the bill of exceptions to have been much disputed at the trial, we find much evidence which would justify a finding that the testator's wife had acquired and exercised over him a domination, particularly in his conduct in respect of his eldest son, which a jury might well find to be undue influence. Without attempting to sum up this evidence it is enough to say that it tended to show that because of this domination of the wife

and of her hostility to the son the father against his own will declined to visit the son's house, to have the son at his own house, and when in the presence of his own wife he met the son in the street omitted to recognize him, although the father when without his wife was in the habit of recognizing the son in the street and of entering into conversation when they met.

The evidence also tended to show that the wife knew the contents of the will of 1882, that she saw the draft memorandum from which the instrument of 1895 was drawn before it was taken to the attorney, and she in substance admitted in her own testimony that she made to her husband the suggestion which resulted in the dropping of the eldest son as one of the executors.

If the jury found as they might a domination amounting to undue influence established over the testator by his wife and exercised against the interest of his son in numerous ways, from the existence of that condition and proof that the wife made some suggestion which found effect against the son's interest in the will by depriving him of an executorship, and from the tenor of the will of 1895 as compared with that of 1882, they were warranted if they saw fit in finding a verdict in the affirmative upon the issue, and the judge was warranted in sending it to the jury.

Exceptions overruled.

FRANK C. RICHARDSON, executor, *vs.* MATILDA W. BLY & others.

Essex. January 15, 1902. — March 7, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Will, Sanity, Undue influence. *Practice, Civil*, Rulings and Instructions.

In the absence of evidence to the contrary there is a presumption of the sanity of a testator. If evidence is introduced to rebut this presumption the burden of proof is on the executor to prove sanity on all the evidence including the presumption.

The fact that a certain person was at the same time the friend, housekeeper and nurse of a testator does not as matter of law create a suspicion of undue influence.

When a request for a ruling is so drawn that to give it as written might be taken

by the jury to convey some intimation from the judge in favor of the party requesting it, the judge for this reason alone may decline to give the ruling in the form requested.

APPEAL from a decree of the Probate Court for the County of Essex allowing certain instruments as the will and codicil of Elias E. Porter.

The case was tried before *Lathrop*, J., with a jury, to whom the justice submitted the following issues:

"First. Were the instruments offered for probate as and for the last will and testament and codicil of Elias E. Porter, late of Danvers, in said county of Essex, deceased, duly executed by the said Elias E. Porter as and for his last will and testament, and codicil in the presence of three competent witnesses, who subscribed the same in his presence?

"Second. At the time of signing said instrument was the said Elias E. Porter of sound mind?

"Third. Was the execution of said papers, and the signature of the said Elias E. Porter to the same, procured by the fraud and undue influence of Jane Anderson and James Anderson and Robert Anderson, or either of them?"

The jury answered the first two issues in the affirmative and the third in the negative; and the appellants alleged exceptions.

J. W. Porter & J. M. Raymond, for the appellants.

H. P. Moulton & D. N. Crowley, for the executor.

BARKER, J. This case comes here upon exceptions taken by the contestants upon the trial by a jury of the usual issues as to two instruments, the one propounded for allowance as a will, and the other as a codicil. The exceptions are to the refusal to give rulings requested and to instructions given. There seems to have been no contention that the instruments were not in fact executed and with the required formalities, but the contestants, who were cousins of the testator and his only heirs at law, did contend that he was not of sound mind and that the instruments propounded were procured by the undue influence of three persons. One of these persons was the housekeeper and nurse. Another of them was a son of the housekeeper and was often a member of the family and between the execution of the will and that of the codicil received from the testator a deed of his farm upon consideration that the grantee would sup-

port the testator and furnish him with what he should need. The other of the three persons was also a son of the housekeeper. The testator's property when the will was executed was worth about $30,000. Of the four heirs at law one was given a legacy of $2,000, another a legacy of $500, and the other two were not mentioned in the will or the codicil. The will gave to the housekeeper a legacy of $5,000, and to each of her two sons a legacy of $2,000, but the legacy to the one who was not the grantee of the farm was revoked by the codicil. The residue of the property was bequeathed to persons other than the heirs, and who do not appear to have been relatives of the persons who are alleged to have procured the will and codicil by undue influence. The trial seems to have been a long one, with much evidence introduced by each party upon the questions of soundness of mind and undue influence.

One of the rulings requested was that "if upon the whole evidence it is left uncertain whether the testator was of sound mind or not, then it is left uncertain whether there was under the law a person capable of making the will; and the will cannot be proved; and this applies also to the codicil." This instruction was given in terms, and the jury were further fully and correctly instructed as to the burden of proof upon both the contested issues and as to both will and codicil. The judge also instructed the jury as follows: "That although the executor has the burden of proof upon him, on all the evidence to satisfy you that the testator was of sound mind at those times, or at one or the other of them, there is a presumption of his sanity; that presumption of course is a rebuttable presumption, and a question for you upon the whole evidence as I have stated. Of course it is presumed that every man is sane, and that presumption stands until it is rebutted. In this case the executor started off in the usual manner of trying these cases, by putting on the attesting witnesses to the will, and the presumption of sanity. Then the other side put in what they contend shows the contrary, and then the executor closed. On the whole evidence the executor has this burden to satisfy you on the evidence." To this instruction the contestants excepted and asked the presiding judge to rule that there is no presumption of sanity when the question of unsoundness of mind is in issue in a hear-

ing on the validity of a will, and they excepted to the refusal so to rule. The instruction given was right and that requested in place of it was wrong. *Baxter* v. *Abbott*, 7 Gray, 71, 83, overruling the dictum to the contrary in *Crowninshield* v. *Crowninshield*, 2 Gray, 524, 532.

The four requests refused were these:

1. If Jane Anderson and James Anderson, or either of them, had acquired an influence over the testator, whether by kind offices of duty, or affection, or attentions to his bodily infirmities, and that influence was made use of improperly for the purpose of inducing the testator to execute an instrument, in this case, the will or the codicil, or both, in such a manner and to such a degree as to substitute the will of either or both of the persons named in place of that of the testator, such influence was undue influence; and the will or codicil or both, if made under such influence, would be void.

2. If the jury find upon the whole evidence, that Jane Anderson at the time when the will and codicil were made, and for a long time prior thereto, was the friend, housekeeper and nurse of the testator, this relation would create a suspicion of undue influence, which might be considered by the jury without any direct proof of such influence.

4. If the jury find from the evidence that, at or about the time when the will or codicil was made, the testator was, in other important particulars, so under the influence of Jane Anderson and James Anderson, or of either of them, that, as to them he was not free, but was acting under undue influence, the circumstances may be such as to fairly warrant the conclusion, from the absence of any evidence bearing directly upon acts done when the will or codicil was actually made, that in relation to those also, the same undue influence was exerted.

6. When a person, charged with the exercise of undue influence, having no claims from relationship, derives a considerable benefit under a will, evidence of direct influence used at its making is not required. The fact of the influence exerted may be gathered from all the circumstances surrounding the testator, — his health, age and mental condition, how far he was dependent upon and subject to the control of the person benefited, the opportunity which the person deriving a considerable

benefit under the will had to exercise his or her influence and the disposition of the testator to be subject to it; and the fact of influence by the person deriving such benefit being established, it is not necessary to show by absolute evidence that it was exerted by such person at the time the will was made.

The second of these requests required the presiding justice to rule as matter of law that whenever one person was at once the friend, housekeeper and nurse of a testator the relation would create a suspicion of undue influence. But in neither aspect does the person stand in a fiduciary relation to the testator. The request was rightly refused because wrong in law.

All the matters treated of in the other three requests to the refusal to give which as asked exception was taken were dealt with in the charge fully and correctly and some of them with more of detail and particularity than in the requests. Leaving the jury at liberty to find undue influence upon the evidence as it stood the presiding justice was not bound to rule that upon some certain state of facts such influence need not be shown by direct evidence. Requests for rulings are often so drawn that to give them as written may be taken by a jury to convey some intimation from the bench in favor of the party at whose request they are made, and for this reason alone a justice charging a jury may decline to give instructions in the form asked for. It is enough if he instructs the jury correctly upon all matters necessary for their guidance, in his own language. In the present case this was done fully and without error.

Exceptions overruled.

EVA A. COOK *vs.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Suffolk. January 9, 1902. — March 8, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Insurance, Fire, Sworn statement of loss. *Waiver.*

The sworn statement required by the Massachusetts standard form of fire insurance policy to be forthwith rendered to the company in case of loss is not in

time if the fire occurred on October 7 and the statement was signed and sworn to on December 15 and furnished to the company a short time thereafter and no reasonable cause for the delay is shown.

A submission to arbitration by an insurance company, under St. 1894, c. 522, § 60, St. 1897, c. 357, to determine the amount of a loss by fire, is not a waiver of objection to delay on the part of the assured in furnishing the sworn statement of the loss required by the terms of the policy to be "forthwith rendered to the company," especially where the submission expressly provides, that neither the submission nor the award thereon "shall in any way affect any other question than that of the amount of the aforesaid loss or damage."

CONTRACT on a fire insurance policy in the Massachusetts standard form on property destroyed by fire on October 7, 1898. Amended from a bill in equity which was filed April 15, 1899.

At the trial in the Superior Court before *Richardson*, J., the jury returned a verdict for the plaintiff in the sum of $1,852.13; and the defendant alleged exceptions.

F. W. Brown, for the defendant.

F. H. Stewart, for the plaintiff.

HAMMOND, J. The loss occurred on October 7, 1898, and a statement was signed and sworn to by the agent of the plaintiff December 15, 1898, and furnished to the defendant "within a short time of its execution." There was no objection to the form of proof, but the only question was whether the statement was rendered forthwith, as required by the terms of the policy.

The defendant in substance requested the judge to instruct the jury that the statement was not furnished in time, and that on the evidence no excuse was shown for the delay. The plaintiff contended that, even if that were so, still the provision, being for the benefit of the defendant, could be waived by it, and that the evidence would justify the jury in finding such a waiver. The defendant insisted that there was no sufficient evidence of waiver. Upon these questions raised as to the sworn statement, the judge instructed the jury only as follows: "The policy also provided that soon after, or immediately after, a loss by fire it was incumbent upon the party claiming to have made a loss to make a statement of the loss somewhat in detail to the insurance company. That was made, but was not made until some time after the loss. It is said to have been made on December 15, so far as I can see — I don't know when it was received, but it seems to have been sworn to on December, 1898,

a little more than two months after the fire. And the statement of loss was not signed by Mrs. Cook, but it was signed by an agent, Frederick W. Libby, an alleged agent; I think it sufficiently appears he was an agent. That is perhaps not the usual course to pursue, but I don't see anything illegal about it. . . .

"And also the question of whether this statement was filed in due time. It was not filed for a considerable length of time after the loss. The loss, or the alleged loss, was, I think, the 8th of October, and this was filed December 15. But that is a thing also which an insurance company by its conduct may waive. Some of these informalities or irregularities either party may waive. That is to say, an insurance company might come to you and say, 'You need not be at the trouble of furnishing the statement, I know about your property, and I will waive it.' They could do that if they saw fit, and could not take advantage of it afterwards if it was waived. And sometimes that occurs by conduct; they go on and treat about it, sign papers about it appointing arbitrators and all that, and it becomes a question whether such a question as that, which a company might insist upon if they wanted to, is not waived by going into inquiries and taking action on things which would naturally come up subsequently to the time of such informality."

To these instructions the defendant excepted, and also to the refusal of the judge to instruct the jury as above requested.

No reasonable cause for the delay in furnishing the statement is shown upon the evidence, and therefore it was not furnished forthwith as required by the policy, and the jury should have been so instructed. *Parker* v. *Middlesex Mutual Assurance Co.* 179 Mass. 528. They were not so instructed expressly, and we do not think that the instructions actually given sufficiently cover the point. They seem rather to imply that the question was left to the jury for their decision. In this respect there was error, and the exceptions must be sustained.

As the case may be tried again, it is well to say, in view of the last paragraph of the charge above quoted, that upon the question of waiver the fact that the case was submitted to arbitration under the circumstances disclosed by this evidence cannot be taken as tending to show waiver. It is to be observed that this is not a case where the notice given within the time is

insufficient on account of some defect in form, as in *Blake* v. *Exchange Ins. Co.* 12 Gray, 265, and similar cases. In that class of cases where, by reason of the action of the insurer, the assured has been led to believe that the notice is right, or at least is acceptable to the insurer, and consequently has not attempted to save himself by giving a correct notice within the proper time, a waiver may be found upon slight testimony, especially where other objections to the right of the assured are stated by the insurer. Such conduct may even amount to an estoppel.

"When one is stating objections, a failure to disclose a ground of objection in a particular which easily could be remedied tends to mislead the other party to his detriment, and is so contrary to justice and good morals as to work an estoppel against doing it afterwards." KNOWLTON, J., in *Brown* v. *Henry*, 172 Mass. 559, 567.

In this present case the reason that the notice was not in conformity with the contract was, not that it was defective in form, but that, although correct in form, it was not given in time. A failure to give the notice within the time required stands upon different ground from a failure to give the notice in due form. The latter defect may be remedied, but the former, if insisted upon, is fatal to the assured. The silence of the insurer even upon a mere defect of form might be very injurious to the assured, since if he were notified of the defect he might save himself by a new notice timely given; but a failure to notify in time leaves him at the mercy of the insurer, and to point out to him the fact will not aid him in the least to remedy the defect. The omission to point out to him the defect is therefore no wrong or want of good faith to him, nor is the insurer under any legal obligation to do so. *Patrick* v. *Farmers' Ins. Co.* 43 N. H. 621. *Edwards* v. *Baltimore Ins. Co.* 3 Gill, (Md.) 176. May, Ins. § 464, and cases cited.

Under the circumstances disclosed in this case, no inference unfavorable to the defendant can be drawn from the fact of arbitration. In the first place the arbitration was compulsory. St. 1894, c. 522, § 60. St. 1897, c. 357.

But the chief reason why the arbitration is not to be regarded as bearing upon the question of waiver is based upon the express

language of the submission that neither the submission nor the award thereon "shall in any way affect any other question than that of the amount of the aforesaid loss or damage." The language implies that there may be questions between the parties concerning the claims submitted other than the amount of loss, and expressly declares that neither the submission nor the award shall affect them. In this case it was known to both parties that there had been considerable delay in sending to the defendant the sworn statement. If the delay was without excuse, then for that reason alone the defendant was free of liability, unless there was a waiver. It does not appear that as to the question of excuse the defendant knew what the material facts actually were, or, (which is sometimes an entirely different thing,) what by reason of honest bias or otherwise the evidence might warrant a jury in finding them to be. Should the evidence be such as to justify a finding that the delay was justifiable and that the statement was sent "forthwith" within a reasonable interpretation of the word, then the defendant might be held liable. If, however, the delay was not excusable, then the only chance for the plaintiff would be to show waiver. The defendant could not control the facts bearing upon the excuse for delay, but the situation, so far as respected acts of waiver on its part, was within its control. In this state of things it was called upon to submit the question of amount, and only that question, to arbitration. It was its duty to comply. It did comply, but upon the condition expressly inserted in the written submission that neither the submission nor the award should affect any other question. To allow the arbitration proceedings to have any bearing upon the question of waiver would be to disregard not only the plain intent of the defendant but the express agreement of the plaintiff.

Exceptions sustained.

ELMER E. HASKELL *vs.* MARGARET W. AVERY, executrix.

Norfolk. November 18, 1901. — March 10, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Bills and Notes.

In the words "For deposit in the National Bank of Florida, to credit of E. J. Neher," written on the back of a note, the name is none the less a signature and an indorsement because it makes part of a sentence.

If the holder of a note payable in Boston indorses it for deposit to his credit in a bank in Florida, this gives the Florida bank the legal right to the note and the right to collect it and authority to indorse it for collection. The fact that the words "or order" were not added to the indorsement for deposit does not limit the power of the bank to indorse for collection.

The indorsement, on a draft payable in Boston and sent from Florida for collection, by a New York bank "for [its] collection account" does not prevent the holder of the draft from suing on it or proving it before commissioners in his own name.

APPEAL to the Superior Court from a decision of commissioners appointed by the Probate Court of the County of Norfolk, to receive and examine claims against the estate of the late Edward Avery.

At the trial in the Superior Court, before *Hardy*, J., it appeared that the creditor's claim disallowed by the commissioners was on a note for $155 and a draft for $185. The note was as follows:

"$155. Boston, May 6th, 1895. Four months after date I promise to pay to the order of Edward Avery One Hundred and Fifty-five dollars. Payable at any Bank in Boston. Value received. James T. Moore."

The note was indorsed as follows:

"Pay to the order of William B. Avery. Edw. Avery.

"Pay to the order of Miss Ida Avery. Wm. B. Avery.

"Pay to the order of Mr. E. J. Neher. Ida Avery.

"For deposit in the National Bank of the State of Florida, Jacksonville, Fla., to credit of E. J. Neher.

"For collection account National Bank, State of Florida, Jacksonville, Fla. Thos. P. Denham, Cashier."

The draft was as follows:

"$185.00. Keuka, Fla., April 7th, 1894. At (10) ten days sight pay to the order of E. J. Neher $185. One Hundred and Eighty-five Dollars. Value received and charge the same to account of Wm. B. Avery. To Hon. Edward Avery, Exchange Building, State St., Boston." Across the face was written: "Accepted. Edw. Avery."

The draft was indorsed as follows:

"E. J. Neher.

"For deposit in National Bank of the State of Florida, Jacksonville, Fla., to credit of E. J. Neher.

"Pay American Exchange Nat'l Bank, New York, or order for credit acct. Nat'l Bank of the State of Fla., Jacksonville, Fla. Thos. P. Denham, Cashier.

"For collection account Amer. Exch'ge National B'k, New York. Edward Burns, Cashier. Apr. 12, 1894."

It seemed to have been admitted or assumed that Elmer E. Haskell, the alleged creditor, was the lawful holder of the note and draft.

The judge affirmed the finding of the commissioners and disallowed the claim; and the appellant alleged exceptions.

U. G. Haskell, for the appellant.

F. Paul, for the appellee.

HOLMES, C. J. The only question is whether the holder of the note and draft can prove in his own name. To decide this it is necessary to consider the purport and effect of two indorsements. The first is that of Neher: "For deposit in the National Bank of the State of Florida, Jacksonville, Fla., to credit of E. J. Neher." Neher's name is a signature although it also makes part of a sentence. The signature is often made part of the last sentence of a letter, but no one ever thought, we suppose, that it was less a signature on that account. The indorsement then is in effect the same as if it read "For deposit . . . to my credit. E. J. Neher." Such an indorsement is restrictive in the sense that it gives notice of the trust to any one who should take the note thereafter, and therefore makes it impossible for one who should discount it for the holder to retain the proceeds, when collected, to his own use. *Lloyd* v. *Sigourney*, 5 Bing. 525. But there seems to be no reason for denying that it gave to the Florida National Bank the right to collect the note and

to that end to bring a suit, if necessary, in its own name. *Regina Flour Mill Co.* v. *Holmes*, 156 Mass. 11, 12. In other words, there seems to be no reason for denying that it gave the bank the legal title to the note, as the bank certainly would have owned the proceeds of the note when collected, and thereafter would have been simply a debtor to Neher for the amount. It does not matter if the title was voidable in case the depositor should have seen fit to revoke his mandate, or the bank had returned the paper upon a failure to collect.

If these preliminaries are admitted, there is not much more difficulty in taking the next step. The very purpose of indorsing a note payable in Boston to a Florida bank for deposit is that the Florida bank should get the note collected and make itself the depositor's debtor by the usual measures. Those, it is well known, are the indorsements through intervening banks to a bank or person in Boston. The fact that the words "or order" were not added did not, of itself, limit the power of the bank to indorse. *More* v. *Manning*, 1 Comyns, 311. *Acheson* v. *Fountain*, 1 Strange, 557. *Edie* v. *East India Co.* 2 Burr. 1216. *Leavitt* v. *Putnam*, 3 Comstock, 494. And the fact that the indorsement to the bank was restrictive in the sense that it disclosed a trust did not prevent the bank from passing the legal title subject to the trust to the Boston bank or person ultimately called upon to collect. This is in accordance with reason, has the sanction of Massachusetts authority, as well as of other courts, and seems to be established as the law for future transactions by statute. *Freeman's National Bank* v. *National Tube Works*, 151 Mass. 413, 417. 1 Daniel, Neg. Instr. (4th ed.) § 698 *d*, note 4. R. L. c. 73, §§ 53, 54. See *National Pemberton Bank* v. *Porter*, 125 Mass. 333, 335.

The second indorsement to be considered is the last appearing upon the paper. It is by a New York bank, "for [its] collection account." The indorsement is in blank, and there is less doubt than in the former case that the words "for collection account" do not preclude the holder from suing or proving in his own name. *Freeman's National Bank* v. *National Tube Works*, *ubi supra*. *Regina Flour Mill Co.* v. *Holmes*, 156 Mass. 11, 12.

For these reasons the appellant should have been allowed to prove his claim. *Exceptions sustained.*

ALLEN A. BROWN, executor, *vs.* ELLEN C. GREENE.

Suffolk. January 16, 1902. — March 10, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Limitations, Statute of. Executor.

The special statute of limitations does not apply to a personal claim of an executor against the assets in his hands.

PETITION, filed May 28, 1901, to the Probate Court for the County of Suffolk by one of the executors under the will of Albert Pitts, late of Boston, for the allowance of a personal claim against the estate upon a promissory note signed by the testator, for $11,500, and $2,873.40 interest thereon.

In the Probate Court the case was heard by *McKim*, J., upon agreed facts. It appeared, that Albert Pitts died on December 19, 1898, that his will was proved on January 12, 1899, and that Alice S. Pitts and Allen A. Brown, the petitioner, were appointed executors, gave bonds and gave notice of their appointment, and that on February 10, 1899, affidavit of notice of appointment was filed. On February 28, 1901, the estate was represented insolvent and there was a decree of insolvency and a warrant issued to commissioners. On May 28, 1901, this petition was filed. The judge made a decree dismissing the petition; and the petitioner appealed.

The case came on to be heard before *Barker*, J., who reserved it, upon the agreed facts, the record, and the requests for rulings of the petitioner and the respondent, for determination by the full court.

A. E. Burr, (*A. A. Highlands* with him,) for the petitioner.

J. Cummings, for the respondent.

HOLMES, C. J. This is an appeal from a decree of the Probate Court disallowing a claim of the petitioner against the estate in his own hands as executor. More than two years after he was appointed and gave bond he represented the estate insolvent, and subsequently filed a petition for the allowance of his claim, we presume under Pub. Sts. c. 136, § 6. The claim is disputed only on the ground that it was not presented within

two years under Pub. Sts. c. 136, § 9, and the question before us is whether the special statute of limitations applies to a personal claim of the executor himself against the assets in his hands.

We are of opinion that so far as appears the claim was not barred. The right of retainer is recognized in this Commonwealth. *Foster* v. *Bailey*, 157 Mass. 160, 164. *Newell* v. *West*, 149 Mass. 520, 528. And although if the executor's debt is disputed, he must file a statement of his claim, Pub. Sts. c. 136, § 6, and although, if the estate is represented insolvent, he ought to proceed as pointed out in *Green* v. *Russell*, 132 Mass. 536, 541, *Newell* v. *West*, 149 Mass. 520, 529, these are merely special requirements for special cases, and do not make any formal proof or claim within two years necessary in order to preserve his rights. When the right of retainer is recognized without qualification it seems to follow logically that the statute will not run against an executor's claim.

In *Attorney General* v. *Hooker*, 2 P. Wms. 338, 340, the Lord Chancellor laid it down that "The law says, and the general notion of mankind is, that the making a man executor, is giving him all." If the executor when he took the place of the heir received his testator's property in his own right, as some things seem to indicate, then of course his claim at once became an item in a mutual credit, and he would not have been bound to pay over more than the balance of the account. From this point of view the mode of accounting has not changed with the supposed change of the executor's position from owning in his own right to a fiduciary holding in *autre droit*. But the latest opinion which we have seen expressed by historical investigators is adverse to the executor's ever having held in his own right, Goffin, Testamentary Executor, 55, and it is not very material for the present decision how the fact may have been. The executor at least has the legal title to the goods from which he seeks satisfaction and those goods are charged with liability for his claim in common with the other debts of the testator. Apart from statute, it cannot be necessary for him to do more in order to secure the right to hold them until his claim is satisfied. *Sanderson* v. *Sanderson*, 17 Fla. 820, 847. *McLaughlin* v. *Newton*, 53 N. H. 531. *Spencer* v. *Spencer*, 4 Md. Ch. 456, 464, 465. *Matthews* v. *Matthews*, 66 Miss. 239. See

Miller v. *Irby*, 63 Ala. 477, 483; *Thomas* v. *Chamberlain*, 39 Ohio St. 112, 122. The doctrine is implied in *Newell* v. *West*, 149 Mass. 520, 529, 530, where the claim was more than two years old when presented. And in *Grinnell* v. *Baxter*, 17 Pick. 383, 385, it was intimated by Chief Justice Shaw that taking administration and having the estate in his own control should be deemed equivalent to bringing a suit for the purpose of saving a claim not barred when administration was taken out.

Of course debts due to an executor must appear ultimately in his account. *Buckley* v. *Buckley*, 157 Mass. 536, 537. But they are not lost by not appearing there within two years, and there is nothing more required to be done until they appear there and are disputed by some one interested in the estate.

Decree of Probate Court reversed.

CAROLINE A. NEWHALL *vs.* SUPREME COUNCIL AMERICAN LEGION OF HONOR.

Suffolk. November 19, 1901. — March 12, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Fraternal Benefit Association. Contract, Construction.

A certificate of membership in a fraternal benefit association contained a promise to pay $5,000 to the wife of the member on proof of the death of the member in good standing, and the promise was declared to be made "in consideration of the full compliance with all the by-laws . . . now existing or hereafter adopted." The certificate contained conditions, that all assessments should be paid and that all advances for sick or disability benefits should be deducted. After the issuing of the certificate and before the death of the member, the association changed its by-laws, cutting down the highest amount to be paid upon any benefit certificate to $2,000, and also providing that five per cent should be deducted from the face value of certificates for an emergency fund. In an action on the certificate, all its conditions having been performed, it was *held*, that the express promise to pay $5,000 could not be changed by the association; that the words "full compliance with all the by-laws," if they meant more than compliance with the conditions in regard to payment of assessments and deduction for advances, meant doing what the by-laws required the member to do, and did not mean that the sum promised in return for the consideration could be diminished.

CONTRACT on a benefit certificate issued by the Supreme Council of the American Legion of Honor for $5,000 payable

to the plaintiff on proof of the death of her late husband, Eben D. Newhall. Writ in the Supreme Judicial Court dated March 1, 1901.

The case was presented to the full court on agreed facts. The certificate was as follows:

"This is to certify that Eben D. Newhall is a Companion of the American Legion of Honor, said Companion having made application for sixth degree membership to Orient Council No. 25 A. L. of H. instituted and located at Taunton in the State of Mass., and passed the requisite medical examination and been duly initiated into said Council, and this Certificate is issued to said Companion as an evidence of the facts in it contained and as a statement of the contract existing between said Companion and the Supreme Council, American Legion of Honor. In consideration of the full compliance with all the by-laws of the Supreme Council, A. L. of H. now existing or hereafter adopted and the conditions herein contained, the Supreme Council, A. L. of H. hereby agrees to pay Caroline Newhall, wife, five thousand dollars, upon satisfactory proof of the death, while in good standing upon the books of the Supreme Council, of the Companion herein named, and a full receipt and surrender of this Certificate. Subject, however, to the conditions, restrictions and limitations following:

"First. That all statements made by the Companion in the application for membership and all answers to the questions contained in the medical examination are in all respects true and shall be deemed and taken to be express warranties.

"Second. That said Companion shall have paid all assessments called to the Benefit Fund within the time and in the manner required by the by-laws of the Supreme Council in force at the time of the issuance of this certificate or as the same may be hereafter amended.

"Third. That all moneys which the Supreme Council, American Legion of Honor, may advance against this Certificate by way of a relief benefit to the Companion named herein, for sick or disability benefits, under existing or hereafter enacted by-laws or regulations may be deducted, at the death of the Companion, from the amount payable to the beneficiary named herein.

"Fourth. That the amount designated by said Companion in his application for membership and stated herein, as a funeral benefit, may be deducted at the death of the Companion, from the amount payable to the beneficiary herein named.

"Fifth. That this benefit certificate is issued by the Supreme Council, and accepted by the Companion herein named, for himself and his beneficiary, upon the express condition and agreement that in case of any false or fraudulent statement or misrepresentation or violation of any of the covenants herein contained the same shall be void.

"In witness whereof the Supreme Council, American Legion of Honor has hereunto affixed its Corporate Seal and caused this Certificate to be signed by its Supreme Commander and attested by its Supreme Secretary at Boston, Massachusetts, this 14th day of Feb. A. D. 1888. Enoch S. Brown, Supreme Commander. Attest: Adam Warnock, Supreme Secretary." [Seal.]

The by-law of the defendant in relation to death benefits, and the benefit fund, in 1880 when Eben D. Newhall made application to become a member of the order, and on February 14, 1888, when the certificate was issued, was as follows:

"Five thousand dollars shall be the highest amount paid by this order on the death of a member. This sum shall be paid on the death of every sixth degree member and four thousand dollars on the death of every fifth degree member, three thousand dollars on the death of every fourth degree member, two thousand dollars on the death of every third degree member, one thousand dollars on the death of every second degree member and five hundred dollars on the death of every first degree member; provided however that should a death occur when one assessment on each member would not amount to five thousand dollars, then the sum shall be a proportionate amount of one assessment on each member in good standing in the order at the date of death, according to the degree of the deceased member, and such amount shall be all that can be claimed by any one."

In 1893 the highest amount payable on the death of a member was made $3,000, and in 1899 was made $2,000, but both of these amendments contained the following provision:

"Provided, however, that nothing herein contained shall be

construed to in any wise impair the obligation of any benefit certificate heretofore issued for a larger or smaller amount than that authorized by the provisions of this by-law."

Finally in August, 1900, the by-law was further amended to read as follows:

"Two thousand dollars shall be the highest amount paid by the Order on the death of a member upon any benefit certificate heretofore and hereafter issued. This sum shall be paid on the death of every member holding a benefit certificate of two thousand dollars or over and one thousand dollars on the death of every member holding a benefit certificate for that amount and five hundred dollars on the death of every member holding a benefit certificate for that amount.

"Provided, that if at the death of said member one full assessment upon each of the members of the Order will not amount to the full sum of two thousand dollars, then the amount to be paid to the beneficiaries of said deceased member shall not exceed the amount collected by said assessment, if said member's certificate is for two thousand dollars; one half of the amount, if the benefit certificate is for one thousand dollars; one quarter of the amount if the benefit certificate is for five hundred dollars. And, provided, that the face value of the benefit certificate shall be paid so long as the emergency fund of the Order has not been exhausted. And, provided, that the said member shall, at the time of death, be a member of the Order in good standing and shall have complied with all the laws, rules and regulations of the Order as they now are, or, as they may hereafter from time to time be amended."

Eben D. Newhall, the husband of the plaintiff, was a member in good standing from the time he entered the order until the date of his death in October, 1900. He paid in the way of dues and assessments laid by the order to the date of his decease, the sum of $3,578.56.

If material, which the defendant denied, it was agreed that for seven years before his death Eben D. Newhall was incapacitated from doing any business, and that he had at the date of his death no personal knowledge of the passage of the by-law of August, 1900, but the plaintiff did have such knowledge, which the plaintiff contended was immaterial.

After the death of Eben D. Newhall the plaintiff tendered to the defendant the sum of $24, the amount which she contended was due from the estate of Eben D. Newhall as a member of the sixth class of the order in good standing, which tender the defendant refused to accept, contending that $9.60 was the amount due the defendant, instead of $24, the amount tendered. The tender of $24 was made on the basis that the plaintiff was entitled to $5,000. The $9.60 claimed to be the amount due by the defendant was upon the basis that the plaintiff was entitled only to $2,000. The plaintiff paid to the defendant the $9.60 demanded, the plaintiff saving her rights to collect the $5,000 if entitled to it.

Due proof of the death of Newhall was filed with the defendant, and a proper tender was made of the benefit certificate to the defendant, and proper demand made for the sum of $5,000.

In August, 1900, a further by-law was passed by the defendant, as follows:

"An emergency fund of five per cent of the aggregate face value of all outstanding benefit certificates, as recognized by the by-laws of the order, is hereby established, to be created, collected, maintained and disbursed in conformity with the laws of the State of Massachusetts; and that for the establishment of said fund there be charged against the certificate of each member of the order, five per cent of the by-laws value (reduced or otherwise) thereof, provided, however, that if upon the decease of any member, any part of said charge shall remain unpaid by the member to said fund, the same shall be deducted from the amount payable to the beneficiary."

It was agreed, if material, which the plaintiff denied, that the several amendments to the by-laws mentioned and quoted were enacted in good faith, and necessitated by the condition of the order at the time.

Upon the facts, if the court should find the foregoing amendments to the defendant's by-laws valid and operative upon the plaintiff, the judgment was to be for $1,700 and interest from the date of the writ; if the finding should be that the by-law reducing the amount of the death benefit was operative, but the by-law requiring the deduction of five per cent for an emergency fund was inoperative, then the judgment was to be for $1,800

and interest; if the court should find that the changes in the laws were invalid and inoperative upon the plaintiff, the judgment was to be for $4,800 and interest, and if the finding should be that the first named by-law was inoperative, but the last named by-law was operative, then the judgment was to be for $4,500 and interest.

The defendant had sufficient money in its emergency fund to pay the plaintiff's claim. The amount of one assessment at the time of the death of Eben D. Newhall exceeded the sum of $5,000.

L. Sullivan, (*N. L. Frothingham* with him,) for the plaintiff.

J. H. Butler, for the defendant.

HOLMES, C. J. This is an action on a certificate of membership issued by the defendant to Eben D. Newhall and promising to pay the plaintiff $5,000 upon certain conditions which have been performed. The defendant sets up that since issuing the certificate it has changed its by-laws and cut down the highest amount to be paid upon any benefit certificate to $2,000. The plaintiff denies the power of the defendant thus to diminish a member's rights under his contract. The promise is made "in consideration of the full compliance with all the by-laws . . . now existing or hereafter adopted," but the conditions attached to the promise refer to the by-laws only so far as to require payment of assessments and the deduction of advances for sick or disability benefits in accordance with them. Subject to these conditions the promise is absolute. Upon these facts we are of opinion that the plaintiff is right and is entitled to recover the larger sum.

If the plaintiff's rights stood simply upon the by-laws in force at the time when the certificate was issued, as was the case in *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 319, the question would be raised whether such a change of by-laws, if necessitated by the condition of the society, was permissible as against her, or was unreasonable and an abuse. See *Messer* v. *Grand Lodge United Workmen*, 180 Mass. 321; *Smith* v. *Galloway*, [1898] 1 Q. B. 71; *Fugure* v. *Mutual Society of St. Joseph*, 46 Vt. 362; *Fullenwider* v. *Supreme Council of the Royal League*, 180 Ill. 621; Niblack, Voluntary Societies, (2d ed.) § 25. But the plaintiff's rights do not stand upon the by-laws alone. They

stand also upon express contract. The promise to pay $5,000 is conditioned by the by-laws only to the extent that has been stated. Even if the "full compliance with all the by-laws" which is mentioned as a consideration for the promise is not interpreted and limited by the more specific provisions of the express conditions, "compliance" in this connection means doing what the by-laws may require the member to do, not submission to seeing his only inducement to do it destroyed. The case is not like *Daley* v. *People's Building, Loan, & Savings Association*, 172 Mass. 533, and *Moore* v. *Union Fraternal Accident Association*, 103 Iowa, 424, where the promise to pay a fixed sum was qualified by reference to a fund from which the payment was to come and which might turn out inadequate from causes over which the defendant had no control. Stating our opinion in a different form, whatever compliance with by-laws may be construed to mean, it does not mean absolute submission to whatever may be enacted in good faith, and it does not extend to permitting a direct deduction from the sum which, on the face of the certificate, any ordinary man would be led to suppose secure. With reference to him the by-law is a plain abuse. *Gaut* v. *American Legion of Honor*, 107 Tenn. 603. *Langan* v. *American Legion of Honor*, 70 N. Y. Supp. 663, 665. *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman*, 44 C. C. A. 92, 99. *Pokrefky* v. *Detroit Firemen's Fund Association*, 121 Mich. 456. *Wist* v. *Grand Lodge A. O. U. W.* 22 Ore. 271, 281.

Another by-law undertakes to deduct five per cent from the face value of certificates for an emergency fund. Whatever may be the right to assess for this purpose, it follows from what we have said that the attempt to cut down the amount to be paid by the defendant under its contract must fail. St. 1899, c. 442, § 12, is not to be construed as attempting to impair the obligation of existing contracts.

Judgment for $4,800.

ROSCOE M. PLAISTED *vs.* EDWARD O. COOKE & another.

Suffolk. March 14, 1902. — March 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Equity Pleading and Practice, Final decree.

On June 1, 1900, the Superior Court made an order, that a certain bill in equity be dismissed for want of prosecution unless the master's report should be filed on or before January 1, 1901. On February 28, 1901, a motion was made to extend the time for filing the master's report. This was denied, and the plaintiff appealed. He also filed a motion or petition asking that the order of June 1 be vacated or modified. This was denied "without prejudice," and the plaintiff appealed. The Superior Court was asked to report the facts, but did not do so, apparently assuming that the bill was dismissed. On an application, treated as a petition for leave to file a bill of review, it was *held*, that there was no final judgment in the Superior Court, and consequently that a writ of review would not lie, and also that the appeals on the interlocutory orders, if before this court, must be dismissed as prematurely entered. *Semble*, that, so far as appeared, the case ought to be on the docket of the Superior Court.

HOLMES, C. J. The record discloses proceedings in two cases, a so called bill of review, and also the pleadings and certain orders or decrees, with appeals from the same, in another case, — we presume that with regard to which the review was sought. The defendants did not see fit to submit an argument, but treated the whole proceeding as frivolous. The plaintiff took the position that both cases were before us. In the original cause an order was made on June 1, 1900, that the bill be dismissed for want of prosecution unless the master's report should be filed on or before January 1, 1901. On February 28, 1901, no further decree having been made, so far as appears by the record before us, a motion was made to extend the time allowed by the order of June, 1900. This was denied and the plaintiff appealed. Another motion or petition was filed, it would seem at a later day, that the June decree be vacated or modified, and this also was denied "without prejudice." An appeal was taken and the court was asked to report the facts. This was not done, — we presume because the Superior Court assumed that the bill was dismissed and that the case was out of court so that it was

beyond its power to deal with the matter, although we notice that the petition was denied, not dismissed.

If, as we understand, there has been no decree dismissing the bill subsequent to the anticipatory decree *nisi*, we are of opinion that the bill is still in court, and that a further decree was necessary to end the case. The meaning of the decree of June 1, 1900, as was said by the Lord Chancellor with regard to a foreclosure decree, was merely that the court *would* dismiss the bill in a certain event at a certain time. *Ford* v. *Wastell*, 2 Phillips, 591, 593. The English practice in similar cases requires a further decree, and it seems to us that that course is desirable in order to avoid the risk of injustice. *Stevens* v. *Praed*, 2 Cox, 374. 2 Dan. Ch. Pr. (5th ed.) 997–999. See *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, 69. Even the entry of "Bill dismissed" on the docket has been held by this court to be merely an order for a final decree. *Merrill* v. *Beckwith*, 168 Mass. 72.

As there is no final decree in the original cause it follows that the so called bill of review was brought prematurely and must be dismissed for that reason without going further. It follows also that the appeals on the interlocutory orders, if they are before us, must be dismissed as prematurely entered in this court. We may remark with regard to them, that in the present state of the record it would be impossible for us to say that the refusal to extend the time may not have been justified by what appeared at the hearings on the plaintiff's motions, although the affidavits printed disclose a plausible case. *Bent* v. *Erie Telegraph & Telephone Co.* 144 Mass. 165, 166. *Giles* v. *Royal Ins. Co.* 179 Mass. 261. If the failure of the judge of the Superior Court to report the facts was due only to the impression that the case was out of court, no doubt a report will be made which will enable us to pass upon the matter at the proper time.

The decree on the so called bill of review purports to deal with it not merely as a bill of review but also, by consent, as a petition for leave to file a bill of review. In these aspects we have disposed of it. The decree also purports to dispose of it as a motion to restore the case to the docket. We hardly see how we can give the document that effect. Probably it will be

sufficient that we intimate our opinion that, if the whole record is before us, the case now is or ought to be on the docket of the Superior Court.

Bill of review dismissed; appeals dismissed.

W. P. Hale, for the plaintiff.

H. H. Pratt, for the defendants, filed a motion for double costs but did not appear at the argument.

LEONARD TUFTS & another, administrators, *vs.* NATHAN WAXMAN.

Suffolk. March 24, 1902. — March 26, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Equity Pleading and Practice. Discretion of Court. Practice, Civil, Double costs.

The refusal of leave to file an amendment to an answer in a suit in equity is within the discretion of the court.

Where it appears on the record of a case reported from the Superior Court that a final decree was entered for the plaintiff from which the defendant did not appeal, the decree of the Superior Court must stand.

R. L. c. 156, § 18, providing for double costs on frivolous appeal or exceptions, probably does not apply to a case coming up on report.

BILL IN EQUITY, filed January 15, 1902, to reach and apply certain property of the defendant to the payment of a debt to the plaintiffs.

In the Superior Court the case was heard by *Bishop*, J., who reported it to this court. By the report it appeared, that the counsel for the defendant requested leave to file an amendment to the answer, setting forth that R. L. c. 159, § 3, cl. 7, is unconstitutional as being contrary to Article 15 of the Massachusetts Bill of Rights and also contrary to the 7th Amendment of the Constitution of the United States, and further setting forth that the special judgment entered in the original action was void, as the claim on which it was obtained was one provable in bankruptcy, and that Pub. Sts. c. 171, § 23, and R. L. c. 177, §§ 24, 25, are contrary to and inconsistent with § 11 of the bankruptcy act of 1898 and annulled by that law.

The judge in the exercise of his discretion refused to allow the amendment to be filed, and the counsel for the defendant excepted to the refusal. The defendant's counsel admitted the allegations of the bill not admitted by the answer, and stated that he did not care to be heard upon any question raised in the case as it then stood, and no evidence was offered by either side. A final decree was thereupon entered ordering the defendant to pay the plaintiffs the sum of $2,331.20 with interest from December 2, 1901, and, in the event of his refusing or neglecting to do so, ordered that certain mortgages and notes belonging to the defendant should be sold, and the proceeds applied to the payment of the plaintiffs' claim.

The plaintiffs' counsel, contending that the defendant's exceptions were frivolous and intended to postpone judgment, requested the judge to report the case to this court in order that it might reach this court in season for argument at the March sitting of 1902, and the defendant's counsel assented thereto. The judge accordingly reported the case to this court. If the judge had no legal right to refuse to allow the amendment, and erred in refusing to allow it, the decree entered was to be vacated and the cause sent back; otherwise the decree was to be affirmed.

P. Tworoger, for the defendant.

W. M. Noble, for the plaintiffs, filed no brief, and moved for double costs.

HOLMES, C. J. If the report of the justice of the Superior Court is properly before us, there is nothing in it to show that his discretion was wrongly exercised in denying the defendant leave to amend. There is no appeal. Therefore, whether the report is properly before us or not, the decree of the Superior Court must stand. The motion for double costs is overruled, as it is at least doubtful whether the statute can be extended to cover this case. R. L. c. 156, § 13.

Decree to stand.

JOSEPH B. KELLEY *vs.* MOSES W. THOMPSON.

Essex. January 17, 1902. — March 27, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Contract, Implied. *Frauds*, Statute of.

In an action on a note for $500 payable in two years from date, the defendant declared in set-off for $881 had and received as "discount on milk at four cents per can," and offered to show an oral agreement made at the time the note was given whereby the defendant was to buy milk of the plaintiff paying twenty-eight cents a can and the plaintiff was to allow the defendant a discount of four cents a can when the note was paid. The evidence was excluded. *Held*, that the exclusion was right. The four cents a can rebate stipulated for by the oral agreement could not be recovered in any event, since such recovery would involve the enforcement of a contract within the statute of frauds where the statute had not been complied with; and the only ground on which anything could be recovered under the declaration in set-off would be, that the oral contract was repudiated by the plaintiff because incapable of proof by reason of the statute of frauds, and that the defendant under it had paid the plaintiff more than the market value of the milk, the excess being paid for something which the defendant had not received. There having been no offer to show that twenty-eight cents was more than the market value of a can of milk, there was no ground for admitting the evidence offered.

CONTRACT on a promissory note for $500 dated October 1, 1892, and payable two years from date, being the same case reported at an earlier stage in 175 Mass. 427. Writ in the Second District Court of Essex dated October 18, 1897.

The defendant filed a declaration in set-off, as stated by the court, of which the eighteenth item was the only matter in controversy. The case came by appeal to the Superior Court. At the second trial in that court, before *Mason*, C. J., the evidence of an oral agreement, which was held in the decision reported in 175 Mass. 427 to be inadmissible in set-off by reason of the statute of frauds and to have been admitted improperly, was again offered and was excluded by the judge; who ruled that the evidence offered would not sustain the defendant's count for money had and received, and directed a verdict for the plaintiff for the whole amount claimed by him. The defendant alleged exceptions.

H. J. Cole, for the defendant.

J. Wiggin, for the plaintiff.

LORING, J. This was an action on a note for $500 in which the defendant filed a declaration in set-off, containing a count for money had and received and one on an account annexed. The only item in the account annexed now insisted on is item eighteen: "To discount on milk at 4 cents per can, $381.68." In the count for money had and received, the plaintiff seeks to recover the same amount as money received to his use. The case has been before this court before, *Kelley* v. *Thompson*, 175 Mass. 427. It was there decided that evidence of an oral agreement between the plaintiff and the defendant, whereby the defendant was to buy milk of the plaintiff and pay twenty-eight cents a can therefor and the plaintiff was to allow the defendant a discount of four cents a can when the note sued on was paid, should not have been admitted. The ground on which that conclusion was reached, was, that, as a defence to the note, it varied a written contract and as an independent cause of action in set-off it was within the section of the statute of frauds, which requires contracts, not to be performed within a year, to be in writing; it was a contract not to be performed within a year, because the note was payable two years after the date of the oral agreement, which was contemporaneous with the note. The case went back to the Superior Court and on a second trial the same evidence was offered and excluded and the defendant comes here on an exception to the ruling of the judge in refusing to admit it.

The defendant now contends "the rule of law to be that where two parties have made an agreement which is invalid by reason of the statute of frauds and one party has paid money or other valuable consideration relying upon said invalid agreement, that if this agreement is repudiated by the party who has received the money, that the party paying the money can recover the sum in an action of assumpsit for money had and received," and cites *Thompson* v. *Gould*, 20 Pick. 134; *Cook* v. *Doggett*, 2 Allen, 439; *Williams* v. *Bemis*, 108 Mass. 91; *White* v. *Wieland*, 109 Mass. 291; *Dix* v. *Marcy*, 116 Mass. 416; *Root* v. *Burt*, 118 Mass. 521; *Parker* v. *Tainter*, 123 Mass. 185; *Holbrook* v. *Clapp*, 165 Mass. 563; *Miller* v. *Roberts*, 169 Mass. 134.

But the rule established by the cases cited by the defendant is not accurately stated by him, and does not support his contention in this case.

That rule is that if a plaintiff has paid money, conveyed property, or rendered services under an oral agreement within the statute of frauds, which agreement the defendant wholly refuses to perform, he can recover the money paid, or the value of the property conveyed, or of the services rendered; in that case there is a total failure of consideration and the plaintiff can recover the value of any benefit inuring to the defendant as a result of the transaction. To the cases cited by the defendant may be added *Basford* v. *Pearson*, 9 Allen, 387; *Pulbrook* v. *Lawes*, 1 Q. B. D. 284; *Riley* v. *Williams*, 123 Mass. 506; *Dowling* v. *McKenney*, 124 Mass. 478; *O'Grady* v. *O'Grady*, 162 Mass. 290; and see *Kneil* v. *Egleston*, 140 Mass. 202, 204; and *Holbrook* v. *Clapp*, 165 Mass. 563, 564, 565. And further, where the plaintiff has performed his agreement in whole, but the defendant has performed his agreement in part only, and a benefit inures to the defendant as a result of the transaction, the plaintiff can recover on an implied promise to the extent of that benefit. *Williams* v. *Bemis*, 108 Mass. 91. *White* v. *Wieland*, 109 Mass. 291. *Dix* v. *Marcy*, 116 Mass. 416. *Miller* v. *Roberts*, 169 Mass. 134. The ground of recovery in that case is that the defendant has got the plaintiff's property without having fully paid for it, or that the plaintiff has paid the defendant in advance without receiving a *quid pro quo*. A recovery is had on the same principles as that given to a contractor who has erected a building on the defendant's land for which he cannot recover under the contract between him and the owner of the land, and which was recently discussed at length in *Gillis* v. *Cobe*, 177 Mass. 584.

In this case the defendant, in his declaration in set-off, is not seeking to recover from the plaintiff on the ground that he had not received a *quid pro quo* for the money paid the plaintiff. What the defendant is insisting on here is that he has not had the discount orally agreed upon. That is what the statute of frauds says he cannot have, since the agreement was made by word of mouth only; and what the statute forbids is equally forbidden whether the defendant seeks to enforce the contract directly by suing on it, or to enforce it indirectly, by seeking to recover back what, if the contract had been valid, would have been an overpayment.

In this case, the defendant did not seek to recover on the broad ground that the plaintiff had got his money without having rendered a *quid pro quo* for it; there was no offer to prove that twenty-eight cents a can could not be taken to be the value of a can of milk. Had he offered to prove that fact and sought to recover the difference between the twenty-eight cents paid by him and the true value of a can of milk, the evidence excluded would have been admissible to show that the milk was delivered and the money paid under an agreement within the statute, not for the purpose of enforcing the oral contract either directly or indirectly, but for the purpose of showing that the money had been paid, not for the milk only, but also for another consideration which had not been performed under an agreement which could not be enforced. *Basford* v. *Pearson*, 9 Allen, 387, 391. Under these circumstances, if the money was paid for something other than the milk and could not be taken to have been a payment for the milk, the defendant could recover in set-off on an implied agreement to refund to the extent to which the defendant had not had a *quid pro quo* for the money paid by him.

It should be added that the rule established by the cases cited by the defendant is not to be resorted to as a means of getting indirectly the benefit of a trade within the statute of frauds, where the statute has not been complied with; if that were to be allowed, the door would be opened to the very frauds, which the statute of frauds was passed to prevent, and the statute would be rendered nugatory. The only reason for ever letting a plaintiff show the oral agreement in such a case, is that, unless this were permitted, the statute would be made the instrument of perpetrating a fraud; it is a fraud for a party to receive performance, in whole or in part, of a contract within the statute of frauds, and when sued on it, to set up the defence of the statute and keep, without paying therefor, what he received under the oral contract; to prevent that fraud, evidence of the receipt by the defendant of value under an oral agreement, for which, as a matter of market value, apart from the trade made by word of mouth, he has not given a *quid pro quo* is allowed; but such evidence is not competent for any other purpose.

Exceptions overruled.

DANIEL T. HAGERTY *vs.* EDGAR F. TUXBURY.

Essex. November 6, 1901. — April 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Intoxicating Liquors.

One owning an interest in a liquor saloon and its stock in trade, but having no license to sell intoxicating liquors, lawfully may sell to his partner his interest in the saloon and the intoxicating liquors it contains.

CONTRACT on a promissory note for $100 dated March 28, 1899, and payable six months from date. Writ in the First District Court of Salem, dated March 29, 1900.

On appeal to the Superior Court the case was tried before *Bell*, J., who refused the defendant's requests for rulings and gave the instructions stated by the court. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs at the sitting of the court in November, 1901, and afterwards was submitted on briefs to all the justices.

A. W. Reddy, Jr. & J. J. Reddy, for the defendant.

W. D. Chapple, for the plaintiff.

LORING, J. This was an action on a promissory note indorsed by the defendant for the accommodation of his brother, Frank Tuxbury, who bought from the plaintiff "his interest" in a liquor saloon and gave this note with others in payment for it. We are of opinion that on the evidence the plaintiff and Frank Tuxbury are to be taken to have been partners, as they were assumed by the presiding judge to have been.

The defendant asked for the following ruling: "If the whole or part of the consideration of the note was for intoxicating liquors sold by the plaintiff to maker of the note and the plaintiff had no license to sell such intoxicating liquors, then the sale was illegal, consequently the consideration of the note was illegal and the defendant is not liable."

The court instructed the jury as follows: "For this purpose I instruct you that if two men are interested in a saloon, one may

sell out to the other without violating the liquor laws of this Commonwealth and therefore, if that is the fact, that it is not a legal defence to the note . . . I will add that element, . . . two parties being interested in the business, but the license being in the name of one of them only. . . . The one selling not having the license."

We are of opinion that the ruling given was correct. On that point *Commonwealth* v. *Pomphret*, 137 Mass. 564, is decisive. In our opinion that case went one step beyond *Commonwealth* v. *Smith*, 102 Mass. 144; in the earlier case there was nothing more than a partition of liquor owned in common; but we do not think that the later case was intended to be confined to the case of a club, where each member on paying for a drink was merely appropriating to himself his share of liquor owned in common but in unascertained proportions, in pursuance of a previous arrangement between the members, but was intended to apply to all sales by a club to its members of liquor owned in common by the club. And this view of the opinion is confirmed by St. 1881, c. 226, Pub. Sts. c. 100, § 45, providing that in towns in which the inhabitants vote that licenses shall not be granted, "all buildings, places or tenements therein, used by clubs for the purpose of selling, distributing or dispensing to their members or others, intoxicating liquors, shall be deemed common nuisances."

Exceptions overruled.

WILBUR F. MORRISON *vs.* CITY OF LAWRENCE.

Essex. November 7, 1901. — April 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Schools and School Committee. Damages.

In an action against a city for the alleged unlawful exclusion of the plaintiff from its public schools, a record of the school committee was put in evidence which stated that the plaintiff had had an opportunity to be heard on the charges against him. Oral evidence was introduced as to the proceedings at the hearing. In holding that the finding of the school committee made in good faith after a hearing could not be revised, the court assumed that the plaintiff was

not precluded by the record from showing the proceedings at the hearing so far as they were pertinent.

In an action against a city under Pub. Sts. c. 47, § 12, St. 1898, c. 496, § 9, for the alleged unlawful exclusion of the plaintiff from its public schools, it appeared, that there was a hearing, at which the school committee refused to permit pupils of a school to be called as witnesses to testify in regard to a question between the principal of the school and one of the pupils, although the principal had read a statement in which he referred to these same pupils as the source of part of his information. The chairman then said, that if any boy wished to volunteer a statement or to contradict anything said of him by the principal, he might do so. No boy volunteered. It was admitted that the school committee acted in good faith. *Held*, that it was error to leave the question to the jury whether the school committee gave the plaintiff a fair, reasonable opportunity to present his case before them, and that a verdict should have been ordered for the defendant. LATHROP, J. dissenting.

In an action against a city for the unlawful exclusion of the plaintiff from its public schools, the plaintiff cannot recover for expenses of tuition elsewhere unless paid out of his own property or funds, but may recover for suffering from the disgrace of his exclusion from school.

TORT for the alleged unlawful exclusion of the plaintiff from the public schools of the defendant. Writ dated April 13, 1900.

At the trial in the Superior Court before *Bell*, J., a record of the school committee was put in evidence which stated that the plaintiff had had an opportunity to be heard on the charges against him. It appeared that the plaintiff's father was notified that a hearing would be granted, and a meeting of the school committee was called for the purpose of giving a hearing on April 10, 1900. The plaintiff, with his father and mother, appeared before the school committee, and they were represented by counsel. The principal of the school also was represented by counsel.

At the opening of the hearing the principal read a written statement of what he contended to be the facts in the case and was cross-examined by the attorney for the plaintiff. The statement of the principal named a number of boys, pupils at the school, as persons from whom he got some of his information as to part of the plaintiff's alleged misconduct. The counsel for the principal then read a written indorsement of the principal, signed by the other teachers in the school, which was prepared by the sub-master of the school. This was all the evidence offered to support the charges.

The counsel for the boy, after examining the sub-master with reference to the indorsement of the principal and the boy's pro-

ficiency in his studies, called as a witness one of the boys referred to in the principal's statement as authority for the accusation. The boy came forward for examination, but the chairman of the board interposed, and said that unless the board overruled him, he should not allow any pupil to be examined on a question between the principal and a student. Thereupon the counsel for the boy stated that the only evidence he had was the testimony of the accused and his fellow-students, some of whom had been referred to in the statement of the principal, that he proposed to call as witnesses all the boys who had been referred to by the principal as authority for the accusation, and if he was not permitted to call them he could go no further. The chairman then said, that if any boy wished to volunteer a statement on the matter or contradict anything said of him by the principal he might do so. None of the boys volunteered any testimony.

The school committee then voted to sustain the action of the principal in suspending the plaintiff, and that the plaintiff be formally given leave to withdraw from the school. The boy did not withdraw, and was not allowed to attend the school.

At the conclusion of the evidence the defendant moved that the case be taken from the jury and judgment given for the defendant, on the grounds, that the records of the school committee were conclusive on the facts of the hearing and showed that the plaintiff had had an opportunity to be heard, and that parol evidence was inadmissible to vary, contradict, or add to the record of the school committee.

The judge refused to take the case from the jury or to rule upon the sufficiency of the hearing, but, subject to the defendant's exception, instructed the jury that the question was: Did the school committee give the boy a fair, reasonable opportunity to present his case before them? If they did, the jury were to go no further. If they did not, the city was liable.

The defendant submitted to the judge two requests for rulings on the question of damages, which were refused by the judge. These are stated by the court, and are called the fourth and fifth requests, there having been three preceding requests upon which the judge gave the rulings requested.

On the question of damages the judge instructed the jury as

follows: "The question is what damages the exclusion of the boy from school has reasonably caused him. Upon that you may consider any expense he may have been put to to obtain an equivalent education so far as has been proved. You may consider any indignity or disgrace which follows from the public exclusion of a boy from school. I think no other elements have been considered."

The jury returned a verdict for the plaintiff, in the sum of $471.70, and the judge, with the consent of the parties, reported the case for the consideration of this court. If the rulings and instructions of the judge were correct, judgment was to be entered on the verdict. If the rulings and instructions on the question of liability were correct, and those on damages were erroneous, a new trial was to be granted on the question of damages. If the rulings and instructions on the question of liability were erroneous, the verdict was to be set aside and a new trial granted, or such other order was to be made as justice and equity might require.

The case was argued at the bar in November, 1901, and afterwards was submitted on briefs to all the justices.

J. P. Kane, for the defendant.

J. P. Sweeney, for the plaintiff.

KNOWLTON, J. This is an action brought under the Pub. Sts. c. 47, § 12, St. 1898, c. 496, § 9, (R. L. c. 44, § 7,) to recover damages for an unlawful exclusion of the plaintiff from a public school. In *Spear* v. *Cummings*, 23 Pick. 224, it was held that a teacher of a town school is not liable to an action by a parent for refusing to instruct his child, and in the opinion, which discusses our school system and the powers and duties of school committees in cities and towns, it was said that if the committee should refuse to permit a pupil to attend a school, it would be assumed that there was a good and sufficient cause for his rejection, inasmuch as the law will not presume that the committee would act arbitrarily and unjustly. It was therefore said that the pupil in such a case would be without remedy. Afterwards the St. 1845, c. 214, was enacted, which is still retained in our law without material change, giving a remedy to a child "unlawfully excluded" from a public school. This legislation makes cities and towns liable for the possible arbi-

trary and wilfully unjust action of a school committee in excluding a child from a school, but it does not otherwise change the powers and duties of committees, or their general relations to the schools. They still have the general charge and superintendence of all the public schools, and as public officers, so far as the performance of their duties involves the exercise of judgment and discretion, they are accountable to no higher authority. Pub. Sts. c. 44, § 21. R. L. c. 42, § 27. The statute under which this suit is brought says impliedly that there may be an exclusion of a pupil which is unlawful, but it does not define the illegality referred to. In *Bishop* v. *Rowley*, 165 Mass. 460, which is the only case decided by this court in which there has been a recovery for an unlawful exclusion, it was said in construing the statute, that "the power of exclusion is not a merely arbitrary power, to be exercised without ascertaining the facts. . . . The school committee should have given the plaintiff or his father a chance to be heard upon the facts, or, in other words, should have listened to his side of the case." But it was also said, following previous decisions of this court, that "if a school committee acts in good faith in determining the facts in a particular case, its decision cannot be revised by the courts." See *Watson* v. *Cambridge*, 157 Mass. 561.

The decision in *Bishop* v. *Rowley*, rests upon a construction of the bill of exceptions whereby the school committee were understood to have arbitrarily refused to give the plaintiff and his father a hearing upon request in regard to the facts upon which his exclusion from the school was founded. In the present case a hearing was had, and the only objection to it is that the school committee refused to permit pupils of the school to be compelled to give testimony in regard to matters between themselves and the teacher and the plaintiff, although ready to receive testimony from any of them who would testify voluntarily. This was, at most, an error in regard to the admission of evidence. It may or may not have had an important bearing upon the hearing, but it has not been contended that the committee were acting otherwise than in good faith. Doubtless they believed that a compulsory examination of the pupils in regard to matters which they probably considered confidential, would be detrimental to the interests of the school. The decision in

Bishop v. *Rowley* does not go so far as to hold that a hearing in regard to the exclusion of a pupil from a school must be conducted with all the formalities of a trial in a court, or that a material mistake, innocently made by a school committee in conducting a hearing, will make his exclusion unlawful. So to hold would be inconsistent with the previous decisions of the court, as well as with some of the language of that case. We are therefore of opinion that there was error in the instructions on the question of liability.

We have assumed without discussion that the plaintiff was not precluded by the record from showing the proceedings at the hearing so far as they were pertinent. See *Alvord* v. *Chester*, 180 Mass. 20; *Russell* v. *Lynnfield*, 116 Mass. 365, 367.

On the question of damages the defendant presented requests for instructions as follows: "4. That the plaintiff is not entitled to recover for the cost of his board, instruction or tuition paid at the school which he has attended since his exclusion from the Lawrence public schools, unless he had shown that he has paid for his board, instruction, or tuition out of his own property or funds. That there being no evidence of that fact, this element of damages is not to be considered by the jury. 5. That the only element of damages is that of being unlawfully prevented from enjoying the benefit of instruction therein, and no compensation is to be allowed for injury to his feelings or his standing in the community as a result of his exclusion." The report shows that the only evidence in relation to damages was the fact of exclusion from the school, with the further fact that the plaintiff did not go to school for the remainder of the school year, but at the beginning of the next school year, after the bringing of this action, went to an academy in New Hampshire. There is nothing in the report to show that the boy had any estate of his own, or that he paid anything for his board or his tuition elsewhere. It appears that he had a father whose duty it was to provide for his wants. We are of opinion that the fourth request for instructions should have been granted, and that the fifth request was properly refused. *New trial ordered.*

LATHROP, J. I am not able to concur in the opinion of the majority of the court, that, upon the facts in this case, the only

thing to be considered on the question of liability is whether the school committee acted in good faith. It doubtless has been said in many cases that the school committee must act in good faith, and in one case and one only has good faith been adopted as the criterion. *Watson* v. *Cambridge*, 157 Mass. 561. But in that case and in all the cases that have arisen this court has been particular to point out that by the evidence the pupil was properly excluded.

It is not perhaps to be expected that a school committee should in all respects be bound by the rules of evidence which prevail in courts of law, or that a court should for a mere error in the admission or exclusion of evidence revise the proceedings of the school committee, but I venture to think that where substantial justice is not done by the school committee, the court should interfere and see that substantial justice is done. See *Haven* v. *County Commissioners*, 155 Mass. 467.

In the present case the plaintiff was accused by the principal of the school of inciting other pupils to write articles for a local newspaper, criticising the principal. The pupil denied the accusation; but the principal persisted in his accusation; and the pupil was finally expelled from school. A hearing before the school committee was asked for and granted. At the hearing the principal read a written statement of what he contended were the facts in the case, and this statement named a number of boys from whom he got some of his information. The principal was also allowed to read a written indorsement of himself, signed by the other teachers in the school, and prepared by a sub-master. The counsel for the plaintiff then called as a witness one of the boys referred to in the principal's statement as authority for the accusation. The chairman of the board said that, unless he was overruled, he would not allow any pupil to be examined on a question between the principal and a student. The counsel for the boy stated that the only evidence he had was the testimony of the accused and his fellow students, some of whom had been referred to in the statement of the principal, and that he proposed to call every boy therein named. The chairman then said that if any boy wished to volunteer a statement, or to contradict anything said of him, he might do so. No one volunteered to say anything; and the board then voted to sustain the principal.

It is manifest that no hearing was had in any true sense of the word. The boy was not shown to be guilty of any offence whatever. The evidence against him was purely hearsay evidence; and under an absurd ruling of the presiding officer of the school committee he was prevented from putting in his defence. His fellow pupils could not be expected to volunteer testimony in his favor, for if they did they too might be expelled in as summary a manner as he was. It is difficult to imagine a more arbitrary and unfair hearing than was given this boy; and in my opinion the judge properly left to the jury the question whether the plaintiff had had a fair trial. If he had not had such a trial, then I think his exclusion was, in the language of the statute, "unlawful." St. 1898, c. 496, § 9. To hold otherwise seems to me to allow the school committee to exclude a pupil at their caprice, and to render of no effect the salutary provisions of the statute giving a right of action.

ANDREW MORTON *vs.* LLOYD B. CLARK & another.

Suffolk. November 22, 1901. — April 1, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Evidence, Extrinsic affecting writings. *Contract*, Construction.

A memorandum of a contract for the sale of merchandise, to be delivered from time to time, stated the quantities and prices of the different kinds of goods and the times for delivery but was silent as to the times of payment. The plaintiff, instead of declaring on an oral contract of which this was a memorandum, declared on the memorandum as a contract in writing. Evidence was admitted of conversations between the parties before and after the time of the writing, tending to show an agreement and understanding of the parties, that the buyer should have a credit of sixty days. *Held*, that this evidence should have been excluded as enlarging or varying the contract declared on, which, naming no times of payment, by implication required payment to be made on delivery of each shipment of the goods.

CONTRACT for alleged breach of a contract in writing by which the defendants agreed to ship to the plaintiff about forty thousand sides of leather, the entire product of the defendants' tannery, in weekly shipments for ten successive weeks, at cer-

tain prices named for the different kinds, the quantity of each kind being stated, and the writing being signed by the defendants. Writ dated January 23, 1895.

At the trial in the Superior Court before *Lawton*, J., without a jury, the judge found for the plaintiff in the sum of $5,000; and the defendants alleged exceptions.

H. M. Rogers, for the defendants.

R. M. Morse, for the plaintiff.

KNOWLTON, J. This action is brought to recover damages for the breach of an executory contract for the sale of merchandise, of which a memorandum in writing was signed by the defendants. The plaintiff declared on the memorandum as a contract in writing, and not on an oral contract of which the writing is a memorandum. He is bound by his declaration, and he cannot object to treatment of the memorandum as a contract in writing. The defendants stood on their rights under the pleadings, and requested the ruling, "that the plaintiff cannot maintain the action on the pleadings." The writing gives the quantities and prices of the different kinds of goods, and prescribes generally the times for the delivery of them as they are ready for shipment, but it is silent in regard to the times for payment. In the absence of evidence to aid in the interpretation of the contract its true construction would require payments to be made from time to time, on delivery of the goods by the different shipments. *Fessenden* v. *Mussey*, 11 Cush. 127. *Stephenson* v. *Cady*, 117 Mass. 6. It makes no provision for any credit; but in the construction of such a writing we may always hear oral testimony in regard to the facts and the subject to which it relates. In this case the plaintiff sought to show that the writing was made as part of a long course of dealings between the parties, in which it was well understood that payments were to be made by drafts on sixty days' time. Such evidence, if there were proper pleadings to warrant the introduction of it, would be competent for the purpose of showing that the true meaning of the writing, as applied to the facts and the relation of the parties, would call for payment by the acceptance of such drafts, instead of payments in cash on delivery of the goods. *Tibbetts* v. *Sumner*, 19 Pick. 166. Whether the evidence received was within the rule, we are unable to determine from the

bill of exceptions. Although the drafts put in evidence are referred to as exhibits, no copy of them has been furnished us and we do not know how long a period they covered. The plaintiff testified that he had done business with the defendants perhaps eight or ten months before making this contract. The judge in his findings says: "The parties had dealt with each other for two years before." It does not plainly appear in the bill of exceptions whether this contract is a part of a general course of dealing, such that the previous terms of payment should apply to it. The plaintiff testified, and all agreed, that the previous dealings were on a very much smaller scale. They may have been independent transactions, each upon its own terms, and so of little or no significance on the question before the court; but they were all sales of goods for which the terms of payment had been uniform. The writing called for payments on delivery of the goods, or for payments by accepted drafts on sixty days' time, according to the effect to be given to the evidence of previous dealings, in reference to the probable understanding of the parties in making this contract.

This evidence was received *de bene*, although the declaration set out a contract which by implication required payments to be made on delivery. Evidence of conversation between the parties before and at the time of the sale and before and after the memorandum was signed was also admitted, which conversation tended to show the agreement and understanding of the parties as to the terms of payment. All this was excepted to. There is nothing in the bill of exceptions to show that it was afterwards stricken out or disregarded, and we infer that the judge considered it in making his findings. Treating the writing as the contract, it was not competent to enlarge or vary it by testimony of conversation between the parties in making their contract, if the conversation would tend to show an oral agreement not included in the writing, or to show by express statement the understanding of the parties as to the terms of sale in reference to the time of payment. The judge has found that there was no express contract or agreement between the parties as to the mode or time of payment, but he declined to rule that the contract imposed "on the plaintiff an obligation to pay on delivery and by instalments, as delivered or shipped." Precisely

what he held to be the legal effect of the contract in this particular, does not appear. He must have held either that it was a contract requiring payments by accepted drafts on sixty days' time, or a contract requiring such payments with a privilege to the defendants to make some of the drafts on ten days' time. In so holding, the testimony excepted to that there was conversation between the parties before and after the memorandum was signed, in which they recognized that to be the meaning of their contract, was doubtless considered, and it would have a tendency to affect the finding. Without this testimony the judge might not have found that there was enough to control the apparent meaning of the writing that the payments were to be made on delivery of the goods. This testimony of what the parties said as to the time of payment before and after making the writing, was incompetent and the exceptions must be sustained. This is without reference to the question of variance arising from a declaration, the legal effect of which is to state a contract calling for payment on delivery, when the judge, upon the evidence, found that the contract did not require such payments.

The finding as to the construction of the contract had an important bearing upon the decision of the case. If the contract was for payments on delivery, the judge might have found a refusal of the plaintiff to pay unless he could have a credit of sixty days, which justified the defendants in refusing to continue their shipments. *Stephenson* v. *Cady*, 117 Mass. 6, 9, 10. *Winchester* v. *Newton*, 2 Allen, 492. *Star Glass Co.* v. *Morey*, 108 Mass. 570, 574. The decision may have been induced by the consideration of incompetent evidence.

If the declaration had been upon an oral contract which permitted payment by draft on sixty days' time, and had treated the writing as a mere memorandum not intended as a formal contract, and had relied on the delivery and acceptance of a part of the property, different questions would have arisen which we need not now consider and upon which we intimate no opinion.

We do not think that the judge was bound to rule as requested by the defendant that everything of a date subsequent to September 17 was inadmissible.

Exceptions sustained.

MORRIS WHITMAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 20, 1902. — April 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Evidence, Opinion, Materiality. *Negligence.*

On the issue of due care of the plaintiff in an action for injuries caused by a collision of a street car with the plaintiff's wagon, the plaintiff cannot be asked, what his judgment was as to whether there was a chance for him to cross the track, he having already testified that he had formed such a judgment. His judgment is immaterial on the question whether he was negligent.*

TORT for injuries caused by the plaintiff being thrown out of his wagon which came in collision with a car of the defendant as the plaintiff was driving across Washington Street from Cherry Street to Davis Street in Boston. Writ dated July 14, 1898.

At the trial in the Superior Court before *Hardy*, J., on the question of the plaintiff's due care, the plaintiff's counsel asked the plaintiff "Now, did you form a judgment at the time as to whether there was a chance for you to cross the track?" He answered "Yes, sir." His counsel then asked him "Now, what was that judgment?" The plaintiff's counsel stated, that by this last question he expected to show that the plaintiff formed a judgment at that time that he had ample opportunity to do without danger what he attempted to do. The judge upon the objection of the defendant excluded the evidence.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in January, 1902, and afterwards was submitted on briefs to all the justices.

J. A. Halloran, for the plaintiff.

W. B. Farr, for the defendant.

HOLMES, C. J. Whether the plaintiff was negligent or not did not depend upon the plaintiff's judgment but upon that of the jury, whose duty it was to decide whether he showed the caution which a man of ordinary prudence would observe.

* Cf. *Coleman* v. *Lowell, Lawrence & Haverhill Street Railway, post.*

Therefore from that point of view the excluded evidence was immaterial. *Commonwealth* v. *Pierce*, 138 Mass. 165, 176.

The question excluded did not seek to bring out a portion of the surrounding facts which could not be stated adequately in detail and which therefore needed to be summed up in some general phrase, as often happens. The external situation sufficiently appeared.

Again there was no question as to what the plaintiff knew about the situation.

The only material fact that we can think of that possibly might have been conveyed by the plaintiff's answer is that he did not get himself run down on purpose. But it does not appear that the defendant charged him with intentionally bringing about the accident, or that the question had any such matter in view. If it was thought necessary to deny intention, a question easily could have been framed that would have been free from objection. Unless it was argued that the plaintiff did intend to get himself run down, his own judgment of the facts sufficiently appeared by what he did. He was allowed to testify that he formed a judgment. See *Missouri, Kansas & Texas Railway* v. *Miller*, 8 Tex. Civ. App. 241, 246.

Exceptions overruled.

WILLIAM P. DOYLE *vs.* AMERICAN FIRE INSURANCE COMPANY.

Berkshire. February 26, 1902. — April 1, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Insurance, Fire, Insurable interest, Representations of assured. *Curtesy. Estoppel,* By deed.

Under the statutes of this Commonwealth in force before the Revised Laws, a tenant by the curtesy initiate had an insurable interest in ordinary buildings on his wife's land, and in case of loss could recover such a sum as would indemnify him, estimated according to the value of his inchoate right at the time of the fire.

If one insures property in his own name after he has conveyed it through a third person to his wife, and with no intention to deceive represents it to the insurance company as his own, whereas his only interest is that of a tenant by the curtesy initiate, this under Pub. Sts. c. 119, § 181, does not invalidate the policy.

One who had conveyed certain real estate through a third person to his wife mortgaged it, giving the mortgage deed in his own name, and then in good faith insured the buildings in his own name by a policy payable in case of loss to the mortgagee. A loss by fire occurred. It was stated, that after the fire the wife reconveyed the property through a third person to her husband. *Semble*, that if the reconveyance was made as stated, the insured could not recover on the policy in the right of the mortgagee, as at the time of the loss the mortgagee had no title, and his subsequent title by estoppel acquired after the fire could not operate against the intervening rights of the insurance company.

CONTRACT on a policy of insurance for the loss of a barn and its contents, destroyed by fire on April 19, 1897, brought by the plaintiff for his own benefit and also for the benefit of Kate W. Rice, as administratrix of the estate of Richard Wood, deceased, the mortgagee named in the policy and to whom it was made payable in case of loss as his interest might appear. Writ in the District Court of Southern Berkshire dated September 17, 1897.

Coming by appeal to the Superior Court, the case was tried by *Maynard*, J., without a jury. The evidence showed, and it was admitted, that the property insured was on a farm in the town of New Marlborough, which was formerly owned by the plaintiff, and that on April 14, 1888, the plaintiff had conveyed the farm, and also the personal property then on the farm, through a third person to his wife, Mary Doyle, who continued to hold the title to the real estate until after the barn and contents were destroyed by fire. At the time of the conveyance Mary Doyle had filed a married woman's certificate of her doing business on the farm on her sole and separate account. No consideration was paid for the transfer, and the plaintiff testified that the conveyance was made in order to enable his wife to manage and control the property for him, and it appeared that he with his wife and children continued to live upon the farm and carried it on and managed it as though it were his own, until 1889, when all the personal property was sold at auction and the plaintiff and his family removed therefrom. In 1890 they came back to the farm and continued to occupy it until the fire in the same manner as before the conveyance, the plaintiff having bought the personal property destroyed in his own name. At the time of the conveyance no transfer was made of the insurance policy then on the buildings. No attempt was made to conceal the transfer, and no change was made in the insurance policy, which

was continued in the name of the husband. A loss occurred under that policy which was paid by the defendant company to the plaintiff, the proof of loss being made out in the name of the plaintiff, no notice being then given to the defendant or subsequently before the fire of any change in title. Upon the expiration of that policy the insurance was renewed and the present policy was issued in the name of the plaintiff as before and payable to the mortgagee. The mortgage upon the farm covered the real estate only and not the personal property, and was given by the plaintiff in his own name to Wood, Rice's intestate, after the conveyance to the plaintiff's wife. Rice claimed the right to recover for the loss on the building only. The fire occurred a few weeks after the execution of this mortgage, and it was asserted in the plaintiff's brief and appeared to be admitted by the defendant at the argument, although not stated in the record, that after the fire and as soon as the attention of the plaintiff and his wife was called to the fact that the record title was in the name of Mary Doyle, she reconveyed the property through a third person to the plaintiff.

The judge found, that the loss upon the barn was $600, the insurance being $500, and that the amount due Rice on the mortgage was in excess of that sum; that in procuring the insurance upon the barn in his own name there was no intent to deceive the defendant or to withhold any facts material to the risk; that the title to the real estate at the time of the fire was in Mary Doyle and that the plaintiff had no interest therein other than an inchoate right of curtesy, and ruled that upon the evidence and findings the plaintiff was not entitled to recover except for loss on personal property.

The judge reported the case, as above, for the determination of this court upon the question of law. If the plaintiff Doyle or Kate W. Rice, representing the mortgagee named in the insurance policy, was entitled to recover for the loss of the barn, then judgment was to be rendered accordingly, or such entry was to be made as law and justice required, but if not, judgment was to be entered upon the finding of the judge.

There was also a supplemental report, not affecting the case.

J. D. Bryant & L. E. Griswold, for the defendant.

A. C. Collins & H. C. Joyner, for the plaintiff and the mortgagee.

KNOWLTON, J. The important question in this case is whether the plaintiff had an insurable interest in his wife's real estate. The facts stated in the supplemental report are immaterial, and the other facts in reference to the changes in title and occupation do not affect the general question which arises whenever a husband, after the birth of a living child, seeks to obtain insurance in his own name on a building attached to his wife's land.

The plaintiff's relation to the property was that of a tenant by the curtesy initiate. Until the enactment of the St. 1900, c. 450, which took effect after the trial of this case, our statutes had carefully preserved the rights of husbands to have estates by the curtesy covering all the real estate of their wives. Pub. Sts. c. 124, § 1; c. 147, §§ 1–6. But our law giving to married women the right to contract, and to hold property as if they were sole, has changed the rights of tenants by the curtesy initiate. A tenant by the curtesy no longer has a right of possession and control of his wife's property in her lifetime. Her control of it is absolute in every particular except that she cannot deprive him of an estate by the curtesy which will become consummate at her death. His right as tenant by the curtesy cannot now be levied on by creditors, as formerly it could. So long as she lives his right is not a vested estate, and cannot be conveyed as a separate interest. It is an inchoate right which cannot be taken from him, whose vesting is dependent only upon the contingency of his survival after the death of his wife. This subject has been considered by this court in a series of decisions. *Mechanics' Bank* v. *Williams*, 17 Pick. 438. *Comer* v. *Chamberlain*, 6 Allen, 166. *Staples* v. *Brown*, 13 Allen, 64. *Walsh* v. *Young*, 110 Mass. 396, 399. *Hayden* v. *Peirce*, 165 Mass. 359. The effect of our statutes and decisions is to leave the right of a tenant by the curtesy initiate like an inchoate right of dower. Prior to the legislation which began with St. 1900, c. 450, was continued in St. 1901, c. 461, and is now found with certain changes in the Revised Laws, the only difference between them was that the former covered the whole real estate of the wife, while the latter covered only one third of the real estate of the husband, and accordingly the former took effect in possession immediately on the death of the wife, while the latter did not vest in possession until after it had been assigned.

It is very plain on principle, and it has often been decided, that a tenant by the curtesy at the common law had an insurable interest in his wife's estate during her life. Whether a tenant by the curtesy before the death of his wife has an insurable interest under the statutes that govern this case is a question which it is not easy to answer. In Pennsylvania, under very similar statutes, a similar question has been answered in the affirmative. *Harris* v. *York Ins. Co.* 50 Penn. St. 341. In *Clark* v. *Dwelling-House Ins. Co.* 81 Maine, 373, it was held that, under the statutes of Maine, on the death of a wife her husband takes an interest in her real estate by descent, and that prior to her death he has not an insurable interest in her property. He is treated like an ordinary heir at law who has a mere expectancy, even though there are limitations upon the power of the wife to deprive the husband of his share by a will or deed without his consent. A similar decision was made in Indiana under a similar statute. *Traders' Ins. Co.* v. *Newman*, 120 Ind. 554. Rev. Sts. of Ind. (1881) §§ 2485, 5117. See also *Agricultural Ins. Co.* v. *Montague*, 38 Mich. 548. In the Massachusetts cases there is no adjudication on the question, but there are strong intimations that it should be answered in the affirmative. *Kyte* v. *Commercial Union Assurance Co.* 144 Mass. 43. *Oakes* v. *Manufacturers' Ins. Co.* 131 Mass. 164, 165, 166.

It is well settled that a vested title to property, legal or equitable, is not necessary to give one an insurable interest in it. *Eastern Railroad* v. *Relief Ins. Co.* 98 Mass. 420, 423. *Williams* v. *Roger Williams Ins. Co.* 107 Mass. 377. *Wainer* v. *Milford Ins. Co.* 153 Mass. 335, 341. *Hayes* v. *Milford Ins. Co.* 170 Mass. 492. *Redfield* v. *Holland Purchase Ins. Co.* 56 N. Y. 354. *Rohrbach* v. *Germania Ins. Co.* 62 N. Y. 47. *Hooper* v. *Robinson*, 98 U. S. 528. *Warren* v. *Davenport Ins. Co.* 31 Iowa, 464. We think that the tendency of the modern decisions is to relax the stringency of some of the earlier cases, and to admit to the protection of the contract all property standing in such a relation to the person seeking insurance that its loss would probably directly affect his pecuniary condition. Under the statutes that we are considering, a tenant by the curtesy initiate has an inchoate right which is recognized and protected by law. Whether in any case it will become vested in a title, depends

on a contingency. The existence of such a right in real estate which has been conveyed away by the wife is an incumbrance upon the property, within the meaning of the common covenant against incumbrances. A grantee holding such a covenant, who procures a release of the right may recover from his grantor any reasonable sum paid to remove the incumbrance. *Harrington* v. *Murphy*, 109 Mass. 299. That the vesting of the right in an absolute title depends on a contingency does not affect the fact that it has a prospective value. So long as the right is recognized by the statute, this ought not to prevent the holder of it from bargaining for indemnity against its loss.

The statutes in Pennsylvania and Massachusetts differ from those in Maine and Indiana by distinctly recognizing the rights of a tenant by the curtesy by name, while in the latter States tenancy by the curtesy is abolished, and the right of the husband depends on a statute of descent and on a limitation of the wife's right of disposal of her real estate. Under the statutes of the two former States a husband's right by the curtesy cannot be taken by the wife's creditors, either before or after her death. In that respect it is like a wife's right of dower. We are of opinion that under our statutes and decisions, a tenant by the curtesy initiate has an insurable interest in ordinary buildings on his wife's land.

It is contended that the value of such an interest in a building at the time of a fire cannot be estimated, and that, therefore, inasmuch as a contract for fire insurance is a contract for indemnity and not for profit, the contract cannot be enforced because the damages are incapable of assessment. This argument is not without force, and it justifies hesitation in holding such an interest to be insurable. In many cases it would require a balancing of probabilities on very uncertain grounds, but inherently it presents no question different in kind from those that often arise in court when the probable length of a particular life must be ascertained. In deciding it we have to determine the probable length of life of each of two persons. For ordinary cases there are tables in common use. Facts peculiarly affecting individual cases can be shown by testimony. In the case of a young husband in perfect health, whose wife is in the last stages of a disease well known to be fatal, it cannot be held that his

inchoate right as tenant by the curtesy of her real estate is valueless, or that there would be great difficulty in determining its value. On principle there is no good reason for saying that such an interest in a husband is not insurable because its value depends upon the probable length of each of two lives. In many cases in which damages must be assessed for personal injuries, there is as much uncertainty as in estimating the present value of an inchoate right by the curtesy. The value of such rights must be determined whenever they come in question in suits upon covenants against incumbrances.

Under the St. of 32 & 33 Vict. c. 71, § 31, contingent claims are constantly valued by the court for allowance against the estates of bankrupts. *Ex parte Blakemore*, 5 Ch. D. 372, 374. *Hardy* v. *Fothergill*, 13 App. Cas. 351.

It being found by the judge that there was no intention on the part of the plaintiff to deceive, it could not successfully be contended under this form of policy that the general statement of the plaintiff's ownership of the property invalidates the policy. Pub. Sts. c. 119, § 181. R. L. c. 118, § 21. *Fowle* v. *Springfield Ins. Co.* 122 Mass. 191. *Walsh* v. *Philadelphia Fire Association*, 127 Mass. 383. *Washington Mills Emery Manuf. Co.* v. *Weymouth & Braintree Ins. Co.* 135 Mass. 503. *Wainer* v. *Milford Ins. Co.* 153 Mass. 335. The plaintiff is therefore entitled to recover in his own right for the loss upon the building as well as for the loss upon the personal property; but for the destruction of the building he can recover only such a sum as will indemnify him for his loss, estimated according to the value of his inchoate right at the time of the fire.

He cannot recover in the right of the mortgagee, because no title passed by the mortgage deed. A title in the mortgagee by estoppel cannot be availed of in this proceeding, because the subsequent deed to the mortgagor under which the mortgagee now claims, was not made until after the fire. If the mortgagee has now an interest in the property, he had none when the loss occurred.

Judgment for the plaintiff upon the finding for the loss upon the personal property, and also for such sum as shall be determined upon in a trial, for his loss upon the building.

ANNIE B. CROCKER & others *vs.* CHARLES U. COTTING & others, trustees.

Suffolk. January 24, 1901. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Way, Extent of easement. *Determination of incumbrances*. *Deed*, Construction.

If a right of way is granted and nothing more appears from the deed or the attending circumstances, the owner of the servient tenement may build over the way or do anything else so long as he does not interfere with or obstruct the right of passage over the soil.

A way created by deeds to the abutters was originally designed as a passageway in the rear of lots intended for dwelling houses on Boylston Street in Boston, the grantor retaining the fee, and there being when some of the deeds were given a building immediately abutting on the way with windows in the second, third and fourth stories opening upon it. *Held*, that the way was shown by the attending circumstances to have been granted as an open way and that it could not be arched over by the owners of the fee. HOLMES, C. J., HAMMOND & LORING, JJ., dissenting.

A way by prescription cannot be determined or defined on a petition under St. 1889, c. 442, which relates only to cases where the title to land "appears of record" to be affected by a possible incumbrance.

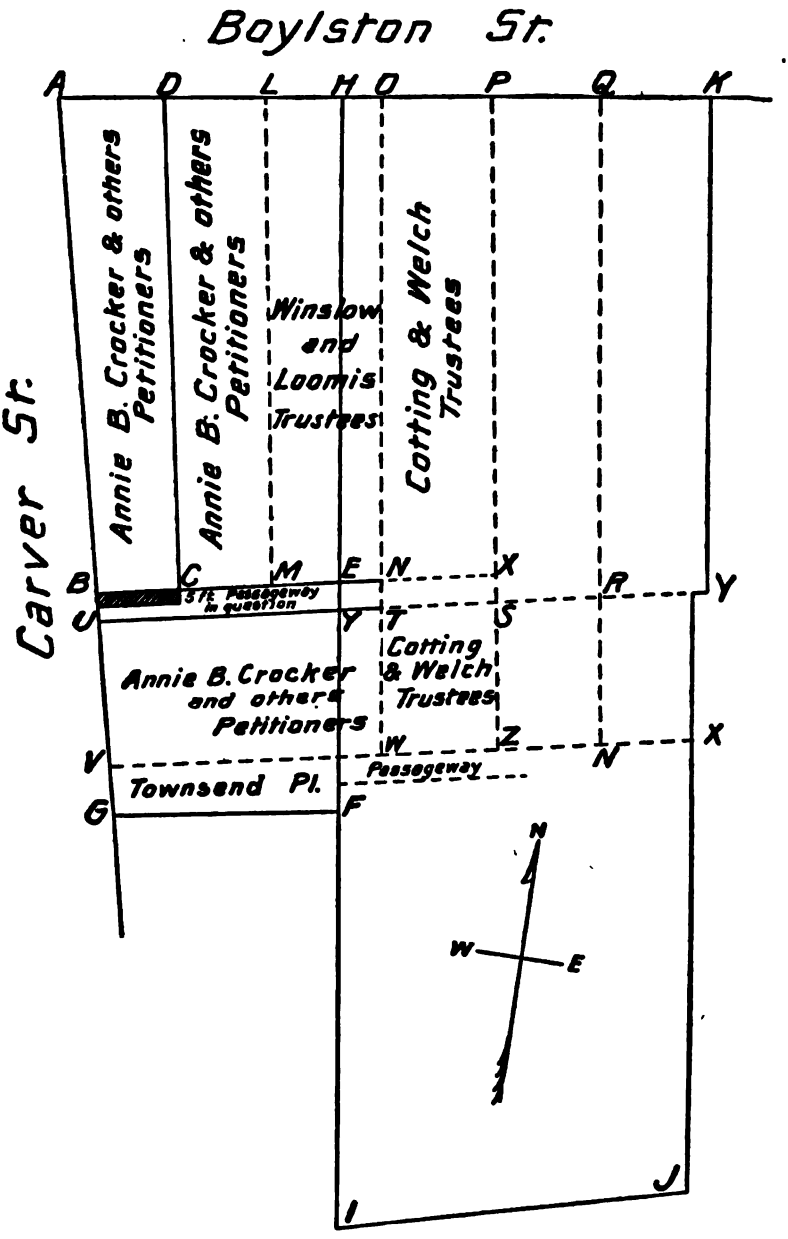
The description in a deed of a rear lot as "an enlargement" of a front lot on a city street previously conveyed does not annex to the rear lot the easements appurtenant to the front lot.

PETITION, filed February 19, 1898, under St. 1889, c. 442, to determine and define the nature and extent of the respondents' easements in a passageway five feet wide and sixty-two feet long, running easterly from Carver Street in Boston at the rear of buildings fronting on Boylston Street belonging to the petitioners and the respondents.

The case was heard by *Hammond*, J., who reported it for determination by the full court. The facts reported are stated by the court. A reduced copy of a sketch used as a chalk at the argument is printed on the opposite page.

The respondents offered to prove by witnesses, that in 1840 a passageway in the rear of a row of houses parallel to the street in front of them was and long had been a common form of rear entrance in Boston, that there existed a uniform public usage

and custom to leave such rear passageways open to the sky, whatever their width and length, and that such passageways are now common and they still are usually open to the sky; that



it was in 1840 a common thing in schemes for laying out land to establish such a rear passageway parallel to the street on which the lots fronted; that by uniform public usage such passageways so laid out were open to the sky, and that the scheme shown by the plan made by Alexander Wadsworth, according to which the conveyances were made, was one of this character.

The justice excluded the evidence offered, under the objection and exception of the respondents.

The questions involved in the case and reserved for the full court were:

1. Whether the passageway might be built over by the owner of the fee thereof, the stipulation of the parties on file governing the height at which the same might be covered, if at all.

2. Whether the petitioner was entitled to have the questions raised by the amendment to the petition, as to the right of the defendants Cotting and Welch to use the passageway in connection with their rear lot, determined in this proceeding. If the court was of opinion that those questions must be determined, then, —

3. Whether the deed of the Townsend heirs to Williams, the predecessor in title of Cotting and Welch, conveyed rights in the passageway appurtenant to the rear lot.

4. Whether the owners of the rear lot acquired a prescriptive right in the passageway, and whether such prescriptive right could be availed of in this proceeding.

In case the court was of the opinion that the evidence excluded should have been admitted, the case was to stand for further hearing; otherwise, such decree was to be entered as justice and equity required.

S. Lincoln & F. Rackemann, for the petitioners.

W. L. Putnam, for the trustees under the will of Samuel K. Williams.

E. G. Loomis, for the trustees under the will of George S. Winslow.

MORTON, J. This is a petition under St. 1889, c. 442, to determine the rights of the parties in a certain passageway. Questions in regard to the same way have already been before this court in 166 Mass. 183, 170 Mass. 68, and 173 Mass. 68. The principal question now is whether the passageway can be

covered over. There is also a question whether the respondents Cotting and Welch have a right to use the passageway in connection with a rear lot belonging to them and adjoining their front lot and forming a part of the same original tract of land as that did. There is a further question in regard to the admission of evidence, which, however, in the view which we have taken of the case need not be considered.

The case was heard by a single justice and comes here on a report made by him; — such decree to be entered as justice and equity require. There is a stipulation by the parties as to the height that the way may be covered over, if it should be finally held that it need not be kept open.

From the report it appears that the way was originally a part of a tract of land belonging to the heirs of one David S. Townsend bounded northerly by Boylston Street and westerly in part by Carver Street and in part by a lot on the corner of Boylston and Carver Streets belonging to other parties. In 1840 the entire tract was laid out by the heirs according to a plan drawn by Alexander Wadsworth. The land on Boylston Street was divided into five lots each about one hundred and ten feet deep. The passageway in question extended at the outset along the rear of these lots, — one hundred and thirty-six feet from Carver Street. At least it did so as a matter of record grant. Subsequently in October, 1842, the grantees of the two easternmost lots released their interest and the scheme was changed in part so that the way extended to the westerly line of the lot now belonging to the respondents Cotting and Welch, — a distance of sixty-two feet from Carver Street. This was the situation at the time when the lots now belonging to the petitioners and to the respondents, Winslow and Loomis, were conveyed by the Townsend heirs in 1843, and the way has remained ever since as thus left. The petitioners own the lot on the corner of Boylston and Carver Streets. But they do not derive their title to it from the Townsend heirs and it may, therefore, be disregarded. The lots to which they derive title from the Townsend heirs are the westernmost of the Boylston Street lots on the northerly side of the passageway and a lot abutting on Carver Street on the southerly side of the way. The deeds conveying these lots bounded them on the way. That of the Boylston Street lot

conveyed it with "the right of passing and repassing in upon and over and of draining under such passageway in common with us our heirs and assigns and all others who may be entitled to said easements and of repairing or replacing said drain when necessary, subject however to payment of a proportionate part of the expense of keeping in repair said passageway and drain." The lot on the southerly side of the way was conveyed with similar rights. The respondents Winslow and Loomis own the Boylston Street lot next easterly of that belonging to the petitioners. It also was bounded on the way, and was conveyed with similar rights in the way. The respondents Cotting and Welch own the lot next easterly of that belonging to Winslow and Loomis. It was not bounded on the way but was conveyed with similar rights in the way. The presiding justice found that "The mesne conveyances to the petitioners and respondents have passed to them respectively all and the same rights and easements in the passageway originally granted to their respective predecessor in title, and by substantially the same words in the several deeds." The Townsend heirs retained the fee in the passageway, and it has passed from them by mesne conveyances one third to the petitioners, one third to the respondents Cotting and Welch and one third to the respondents Winslow and Loomis. The Boylston Street lots were all conveyed with building restrictions limiting the nearness to the street of the front lines of buildings that might be erected thereon, and down to about 1880 the buildings on them were used for first class dwelling purposes only. In 1895 and since they were or have been used for mercantile purposes. When the lot on the southerly side of the passageway was conveyed there were dwelling houses on it fronting on Carver Street. The northerly wall of one of these houses coincided with the southerly line of the way, and there were windows in the second, third and fourth stories opening upon the passageway. These buildings were used as dwelling houses until 1895 when they were replaced by a building used for mercantile purposes and for offices by the petitioners. Proceedings are pending in the Probate Court for a partition of the passageway.

The question is one of construction, of ascertaining the intention of the parties in creating the way, and of giving effect to

that intention if it can be done consistently with established rules of law. There is no rule that determines once and for all whether parties have or have not the right to build over a way. It would be possible to establish such a rule perhaps, but it has not been done. In some cases it has been held that a way could be built over. *Atkins* v. *Bordman*, 2 Met. 457. *Gerrish* v. *Shattuck*, 132 Mass. 235. *Burnham* v. *Nevins*, 144 Mass. 88. *Grafton* v. *Moir*, 130 N. Y. 465. In other cases it has been held that it could not. *Schwoerer* v. *Boylston Market Association*, 99 Mass. 285. *Brooks* v. *Reynolds*, 106 Mass. 31. *Salisbury* v. *Andrews*, 128 Mass. 336. *Attorney General* v. *Williams*, 140 Mass. 329. In each case the question has been one of construction, what the parties to "the convention," as Shaw, C. J. termed it in *Atkins* v. *Bordman*, intended. It was so held in *Atkins* v. *Bordman*, *supra*, the leading case. In *Gerrish* v. *Shattuck*, *supra*, the opinion begins by saying that "The rights of the plaintiff depend upon the construction to be given to the reservation in the deed," etc. And in *Burnham* v. *Nevins*, *supra*, it is said that "the extent of the easement claimed must be determined by the true construction of the grant or reservation . . . aided by any circumstances surrounding the estate and the parties which have a legitimate tendency to show the intention of the parties." Speaking generally, if a right of way is created, and nothing more appears from the deed or the attendant circumstances, the owner of the servient tenement may build over the way, or do anything else so long as he does not interfere with or obstruct the right of passage over the soil. The cases on which that proposition rests in this State are *Atkins* v. *Bordman*, *Gerrish* v. *Shattuck*, and *Burnham* v. *Nevins*, *supra*. See Jones, Easements, § 395. In *Atkins* v. *Bordman* and *Gerrish* v. *Shattuck* the way was created by reservation. In such cases it would seem to be clear that the right or easement over the granted premises will be limited to that expressly reserved. It is said that "if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." *Wheeldon* v. *Burrows*, 12 Ch. D. 31, 49. *Brown* v. *Alabaster*, 37 Ch. D. 490, 504, 505. In *Burnham* v. *Nevins*, the easement was created partly by reservation and partly by grant over lots which were subsequently conveyed. Those cases all differ

from this. In the present case the land, of which the lots in question belonging to the petitioners and respondents constituted a part, was laid out by the Townsend heirs into house lots as an entire tract in 1840. The lots on Boylston Street were intended for first class dwelling houses. A passageway was provided in the rear of these. As at first designed it extended a distance of one hundred and thirty-six feet from Carver Street. Subsequently it was shortened to sixty-two feet, its present length. Manifestly it would add to the desirability of the Boylston Street lots for first class dwelling houses if there was an open passageway in the rear for light, and air, and prospect. And when the length of it as originally intended is also taken into account it would seem that it must have been designed as an open way. The fact that it was afterwards shortened cannot affect, we think, the character originally impressed upon it. Further, the original grantors retained the fee of the way, as finally laid out and established, in themselves; — a fact inconsistent with a right on the part of the abutting owners to build over it, and consistent only with the view that it was to be kept open. There is also the circumstance that when the Townsend heirs conveyed the lot on the southerly side of the way, a building, whose north wall coincided with the southerly line of the way, had been erected on it with windows in the second, third and fourth stories opening on the way. It is true that the way is a narrow one, but that fact of itself does not show that this way was not to be kept open. It is said, and no doubt truly, that there are narrow ways in Boston that are left open and wide ways that are arched over.

It is immaterial it seems to us that the deeds were not all given at the same time. The way retained the character originally impressed upon it whatever that was and the deeds were given pursuant to the original scheme which remained unaltered except that the grantors of the two easternmost lots released their rights in the way in exchange for similar rights in a way on which the rear lots subsequently bought by them abutted. In the absence of anything in the deeds showing whether the way was to be kept open or could be covered over, we are obliged to resort to the attendant circumstances for aid in their construction, and taking these into account, it seems to us, that

it was the intention of the parties that the way should be an open way, and that the deeds under which the petitioners and respondents derive their titles should be so construed.

The next question relates to the right of the respondents Cotting and Welch to use the passageway in connection with the rear lot belonging to them. After the predecessor in title of Cotting and Welch had purchased from the Townsend heirs the Boylston Street lot he purchased from them a lot in the rear of and adjoining that lot. The deed of the lot thus purchased recited that the parcel of land conveyed by it was "designed as an enlargement of the tract of land conveyed to" the grantee of the Boylston Street lot. Cotting and Welch contend that they have a right to use the passageway in connection with this lot either on the ground of prescription or on the ground that the description of the lot as an enlargement of the Boylston Street lot annexed to it the easements appurtenant to that lot. So far as their alleged right depends on prescription we are of opinion that it cannot be considered in this proceeding. The statute under which this petition is brought provides that, "When the title to land appears of record to be affected by a possible condition, restriction, reservation, . . . any person having a freehold estate . . . may file a petition," etc. St. 1889, c. 442, § 1. Titles affected by prescriptive rights are excluded by the words of the statute, and are not we think included within its intent, — the idea being, it seems to us, to enable parties to obtain the construction of the court in regard to questions arising under written instruments and not to determine matters *in pais*. See *Arnold* v. *Reed*, 162 Mass. 438; *Blanchard* v. *Lowell*, 177 Mass. 501. In respect to the other question it is to be observed that the deed of the rear lot contained no reference to the passageway in question. It bounds the lot on the south by a five foot passageway, which it is admitted is not the passageway in question, and gives rights of passing and repassing and of drainage in and over the passageway thus referred to. There are no words of grant or covenant in respect to the passageway in question or of any right or easement in or over the same. Apparently the grantee was content with the right of passing and repassing and of drainage over the way on which the lot abutted on the south. But however that may have been we do not think

that the description of the rear lot as "an enlargement of the tract of land" previously conveyed can be fairly held in the absence of any words of grant or covenant to annex to the rear lot the easements appurtenant to the front lot. The language referred to may have been inserted merely to make the situation of the rear lot plainer.

The remaining question relates to evidence that was offered by the respondents and excluded of a public usage or custom in Boston to have passageways like that in this case open to the sky. The respondents have suffered no harm from the exclusion of this evidence and it is not necessary to consider whether it was admissible. *Decree accordingly.*

The CHIEF JUSTICE and HAMMOND and LORING, JJ., do not agree with so much of the opinion as decides that the way must be kept open.

EDWARD E. DUTTON *vs.* AMESBURY NATIONAL BANK.

Essex. November 7, 1901. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Agency. Master and Servant. Negligence, Contributory.

The plaintiff's shop was in a building separated by a passageway six feet wide from the defendant's bank building, the boundary line running through the centre of the passageway. The cashier of the defendant employed one S. to repair the cellar wall of the bank on the side next the passageway in order to stop water from flowing into the cellar. Workmen employed and paid by S. negligently left extending across the passageway a pile of earth from the excavation made in repairing the wall. After the pile of earth had remained there for a week, a snow storm followed by rain occurred, and the pile of earth dammed the water in the passageway and caused it to flow in at the plaintiff's window and injure his goods. *Held,* that there was no evidence that the workmen of S. whose negligence caused the injury were the servants of the defendant. KNOWLTON, J. dissenting. *Held, also,* that the plaintiff was not as matter of law negligent in allowing the pile of earth to remain for a week where it was, one half of it on his own land.

TORT for injury to goods of the plaintiff by a flow of water alleged to have been caused by the negligence of the defendant's

servants in leaving a pile of earth in a common passageway, thus turning surface water into a window of the plaintiff's shop. Writ dated April 26, 1900.

The case was heard in the Superior Court by *Maynard*, J., upon an auditor's report agreed by the parties to be true. The rulings requested by the defendant and refused by the judge are stated by the court. The judge found for the plaintiff in the sum of $123.75; and the defendant alleged exceptions.

The case was submitted on briefs at the sitting of the court in November, 1901, and afterwards was submitted on briefs to all the justices.

A. W. Reddy, Jr. & J. J. Reddy, for the defendant.

M. A. Pingree & J. J. Ryan, for the plaintiff.

LATHROP, J. This is an action of tort for injuries sustained by the plaintiff in consequence of the negligence of persons alleged to be the servants of the defendant. In the Superior Court the case was sent to an auditor, who found certain facts, and further found for the plaintiff in the sum of $123.75. The case was then heard by a judge of the Superior Court upon the report of the auditor, whose findings were agreed to be true, and a finding was made for the plaintiff in the same amount. The case comes before us on the defendant's exceptions to the refusal of the judge to give two rulings requested. Before stating them, it will be necessary to set forth the facts found by the auditor, which are in substance these.

The plaintiff was the occupant of a store on the westerly side of Main Street in Amesbury, separated from the defendant's building by a passageway about six feet wide. The division line between the two estates ran through the centre of the passageway. In March, 1890, the defendant found that water was coming into its cellar through the wall next to the passageway, and the cashier of the defendant went to the place of business of one Sawyer to get him to repair the cellar wall and stop the water from running into the cellar. Sawyer was not in, but the cashier found one Grenier, who was in Sawyer's employ, and who had charge of the business in the absence of Sawyer, and requested him to go to the place, and stop the water from running into the cellar. Grenier went to the building, employed

help, and dug up the earth in the passageway in order to reach the leak in the defendant's wall. The earth dug up was thrown in a pile across the passageway from the plaintiff's store to the defendant's building. The pile remained there about a week, when there came a snow storm, followed by rain. The water ran down the passageway until it was stopped by the pile of dirt, when it ran into a window of the plaintiff's store, the sill being at about the level of the surface of the passageway, and did the injury complained of.

The plaintiff knew that the pile of earth was across the passageway for a week before the water ran into the store. As soon as the plaintiff found that the water was running into the store, he dug away the pile of earth and stopped the water from coming in. The auditor found that the plaintiff was not guilty of negligence in not removing the pile of earth before the storm.

In answer to the contention of the defendant that Sawyer was a contractor, the auditor reported as follows: "I do not find that said Sawyer made any contract with the defendant to stop the water from running into its cellar, but I find that said Sawyer did the work under a general employment, and was to receive a reasonable compensation therefor." In this connection also, the following appears in the report: "It did not appear that the defendant gave any directions about the work done by Grenier, but left the method of doing the work and stopping the leak to his judgment."

The requests asked for and refused were as follows: "1. On the evidence as agreed, the relation of master and servant did not exist between Sawyer and the defendant, and the plaintiff cannot recover. 2. The plaintiff, having seen the earth piled upon his own land at least a week before the injury complained of, it was his duty to remove it, or to so arrange it as to prevent it being the cause of further damage, and not having done so, did not comply with the law which requires every one to use reasonable care to protect his own property against what may cause injury to it and to prevent unnecessary damage."

The principal question in the case arises on the first request for instructions, and is whether the relation of master and ser-

vant existed between the defendant and Sawyer. To establish the liability of one person for the negligence of another, it is not enough to show that the person whose negligent action caused the injury was at the time in the employment of the person sought to be charged, but it must also be shown that the relation of master and servant existed between them. This distinction sometimes has been lost sight of. Until the case of *Hilliard* v. *Richardson*, 8 Gray, 349, was decided, our decisions were in a somewhat anomalous state. Compare *Sproul* v. *Hemmingway*, 14 Pick. 1, 5, with *Stone* v. *Codman*, 15 Pick. 297. In *Hilliard* v. *Richardson*, it was held that where the owner of land employed a carpenter for a specific price to repair a building thereon, and to furnish all the materials for the purpose, he was not liable for injury to a third person, caused by the negligence of a teamster employed by the carpenter in depositing boards in the highway in front of the house. See also *Linton* v. *Smith*, 8 Gray, 147; *Conners* v. *Hennessey*, 112 Mass. 96; *Boomer* v. *Wilbur*, 176 Mass. 482.

It so happened in *Hilliard* v. *Richardson* that the price to be paid was a specific sum, and it is not surprising that at first this fact was seized upon as the turning point in determining whether the relation was that of master and servant or of contractor and contractee. See *Brackett* v. *Lubke*, 4 Allen, 138; *Forsyth* v. *Hooper*, 11 Allen, 419. Later, the method of payment was held to be not the test, but whether the person employed "was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer." *Morgan* v. *Sears*, 159 Mass. 570, 574. See also *Dane* v. *Cochrane Chemical Co.* 164 Mass. 453, 456; *Harding* v. *Boston*, 163 Mass. 14; *Hexamer* v. *Webb*, 101 N. Y. 377, 385; *Corbin* v. *American Mills*, 27 Conn. 274; *Murray* v. *Currie*, L. R. 6 C. P. 24.

In the case at bar the burden of proof was upon the plaintiff to show that the relation of master and servant existed between the defendant and Sawyer. This was not shown. The language of the auditor, when he says: "I do not find that said Sawyer made any contract with the defendant to stop the water from running into its cellar," would seem to mean "no contract in

writing." But this is not important. There was clearly a verbal contract either to stop the water from running into the cellar or to try to stop it, — and it is immaterial which, — for which Sawyer was to have a reasonable compensation. In carrying out this contract, the plaintiff was injured by the negligence of the servants of Sawyer, who were hired by his representative Grenier. The defendant neither hired these servants nor was under any obligation to pay them. It exercised no control over them, nor, so far as appears, had any right to exercise such control. The method and manner of doing the work was left entirely to the skill and judgment of Sawyer, who on the facts found does not appear not to have been an independent contractor, for the negligence of whose servants the defendant is not shown to have been responsible. The first instruction requested should therefore have been given, at least in substance.

The second instruction requested was properly refused. The auditor did not find that the plaintiff was guilty of negligence in not removing the pile of earth before the storm. We cannot say, as matter of law, that the plaintiff was not in the exercise of reasonable care. *Exceptions sustained.*

KNOWLTON, J. I do not agree to the opinion of the majority of the court. I cannot make plain the reasons for my dissent without stating propositions which seem to me elementary. If the cashier had directed the janitor of the bank to dig up the earth and stop the opening in the wall, I think no one would doubt that the janitor would have been the servant of the bank in doing the work. The same result would as certainly have followed if the cashier had found a laborer waiting for a job at the corner of a street and had employed him to do the work under the same general direction. In each case, irrespective of the amount or mode of payment, the employee would be the servant of the bank in such a sense as to create a liability from the bank to third persons for the consequences of his negligence. This is because the business that would be going on in making the repairs would be the bank's business, of which it would have a perfect legal right of control. It could at any time suspend or continue the work, and the employee would be all the time subject to any direction that it might choose to give. He would

have no right for a moment to do anything against the will of the bank, and in everything he did he would be the representative of the principal proprietor. Under such circumstances the proprietor is justly held accountable to third persons for that which is done. One working in such a way is, in reference to persons affected by his work, the servant of the proprietor.

If the work is done by an independent contractor under an agreement which makes him accountable only for the result to be produced, and which gives him a right to determine how the result shall be accomplished, and to control the persons and instrumentalities employed to accomplish it, this contractor becomes the proprietor of the business included in the contract, and the owner with whom he contracts is not responsible for his methods or for those of his servants. But so long as the owner makes no contract that divests him of the proprietorship of the business as it goes on, and of the legal right to control it, his rights and liabilities are not affected by the fact that he chooses to intrust the management to a servant who is an expert. It often happens that a servant is a person of great skill and experience in the business in which he is engaged, and that the master is entirely incompetent to do the work with his own hands, or even to give intelligent directions about the details. It never was held that the legal relations of the parties are any different in cases where the master tells the servant what he wants done and leaves to him the method of doing it from their relations in those where the master gives personal directions in every detail. The proposition that liability to third persons depends not upon the exercise of control by the owner, but upon the right to exercise it, was elaborately stated in the charge to the jury in *Linnehan* v. *Rollins*, 137 Mass. 123, and the instructions were approved by this court. The principle is familiar law, and has been applied in many cases.

The facts found by the auditor introduce an element which is often spoken of in the cases as the furnishing or lending of a servant by his general master to another person who becomes his master for the time in the business in which he is employed. This furnishing or lending is commonly for a valuable consideration, but the liability of a hirer to third persons is the same as if the servant were lent gratuitously. *Donovan* v. *Laing*, [1893]

1 Q. B. D. 629, 633. One who needs temporary service of a special kind often can obtain it most easily by applying to one engaged in that kind of business, who sends him one or more of his servants to do the work. In such a case, when there is no special contract by which the owner gives up his right to control the business or to change his mind, the persons sent become his servants while doing his work, so far as relates to his liability for their acts. They are not his employees within the meaning of the word as used in the employers' liability act. St. 1887, c. 270, § 1, R. L. c. 106, § 71. This statute in most of its provisions deals only with those who stand in the direct contractual relation to each other of employer and employee. It has been held not to apply to those who have come into the relation of master and servant only through their respective contracts with a third person who is the general employer of the servant. *Dane* v. *Cochrane Chemical Co.* 164 Mass. 453. The general principles applicable to lending or furnishing servants for hire have been stated in many cases. *Samuelian* v. *American Tool & Machine Co.* 168 Mass. 12. *Hasty* v. *Sears*, 157 Mass. 123. *Ward* v. *New England Fibre Co.* 154 Mass. 419. *Killea* v. *Faxon*, 125 Mass. 485. *Clapp* v. *Kemp*, 122 Mass. 481. *Coughlan* v. *Cambridge*, 166 Mass. 268, 277. *Kimball* v. *Cushman*, 103 Mass. 194, 198. *Forsyth* v. *Hooper*, 11 Allen, 419, 421, 422. *Morgan* v. *Sears*, 159 Mass. 570.

Where one furnishes for hire or lends to another a team of horses with a driver, the circumstances are often such that while the driver becomes in some parts of the business the servant of the person to whom the team is furnished and who has the right to tell him what to do and where to go, he is the servant of his employer in those particulars which relate directly to the management of the horses, because it is implied that, in the interest of the owner of the team and as his representative, he will manage and direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the vehicle. In these particulars, for the preservation of his property, it will be presumed that the owner of the team retains in his driver the right of control. See *Reagan* v. *Casey*, 160 Mass. 374; *Huff* v. *Ford*, 126 Mass. 24; *Quarman* v. *Burnett*, 6 M. & W. 499; *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890; *Jones* v. *Scullard*,

[1898] 2 Q. B. 565, 572; *Donovan* v. *Laing Construction Syndicate*, [1893] 1 Q. B. 629, 633.

The present seems to me an ordinary case of one who procures from another, to do certain work, servants who are supposed to know how to do it. It does not appear, nor is it material, whether the first part of the first instruction requested, properly could have been given, namely, that "the relation of master and servant did not exist between Sawyer and the defendant," for so far as appears, Sawyer did not serve personally in the business, but did the work only in the sense that he furnished his servants to do it, and was to receive a reasonable compensation for their services. This he did through his foreman who received the order and acted under it. The defendant all the time had the legal right to control all the work in every particular. There was no contract to prevent the defendant from suspending it at any time, or from making any change that it chose in regard to it. The fact that the defendant chose to leave the method of doing it to Sawyer's foreman is immaterial.

The case is identical in its legal principles, and almost identical in its facts with *Stone* v. *Codman*, 15 Pick. 297, which is discussed and approved by Mr. Justice Thomas in *Hilliard* v. *Richardson*, 3 Gray, 349, 351. In my judgment it is impossible to make a legal distinction between the two cases. In *Hilliard* v. *Richardson* many other cases are considered, and among them *Sadler* v. *Henlock*, 4 El. & Bl. 570, which is also very similar to the case at bar. I am of opinion that the auditor and the judge of the Superior Court were right in their rulings.

CHARLES P. GARDINER *vs.* INHABITANTS OF BROOKLINE.

Norfolk. November 20, 1901. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Tax, Domicil. *Evidence*, *Res Gestæ*. *Practice*, *Civil*. *Exception*.

On an appeal under St. 1890, c. 127, from a refusal of the town of Brookline to abate a tax assessed in 1899 upon the petitioner on the ground that the petitioner had changed his domicil in 1887 from Brookline to Newcastle, Maine, the town requested a ruling, that evidence that the petitioner in September, 1886, and on March 12, 1887, notified the selectmen of Newcastle of his intention of becoming a resident of that town, was incompetent and immaterial. The last named date was a few weeks before the petitioner left Brookline and took up his abode in Newcastle. The ruling was refused. *Held*, that the refusal was right. Although the first notification was immaterial, the last was admissible as qualifying and giving character to the act of the petitioner in moving to Newcastle.

Where a ruling requested is in part correct and in part errroneous and the party requesting it does not ask for a separate ruling on the correct part, no exception lies to the refusal of the whole ruling.

On an appeal under St. 1890, c. 127, from a refusal of the town of Brookline to abate a tax assessed upon the petitioner, it was *held*, that the facts, stated at length by the court, warranted the finding, that the petitioner had changed his domicil from Brookline to Newcastle, Maine, and had retained the new domicil thus acquired.

A man who owns a house in each of two towns may change his domicil from one of the towns to the other and, after he has done so, the fact, that in a particular year he happens to be living at his house in his former domicil on the first day of May, is of no consequence, unless the facts show an intention to resume his former domicil.

APPEAL, filed May 7, 1900, to the Superior Court, under St. 1890, c. 127, from a refusal of the assessors of the town of Brookline to abate a tax assessed upon the petitioner on May 1, 1899.

At the hearing before *Stevens*, J., it was admitted that the petitioner was liable to taxation on his real estate in Brookline, and on some cows kept there. The taxes sought to be abated were a poll tax and a tax on his personal property, the petitioner claiming a domicil at Newcastle in the State of Maine. The judge found in favor of the petitioner; and the respondent alleged exceptions.

C. A. Williams, for the respondent.

R. F. Sturgis, for the petitioner.

LATHROP, J. The question in this case is whether the petitioner had his domicil in Brookline in this Commonwealth on May 1, 1899, or whether on that day he was domiciled in Newcastle, in the State of Maine. The judge has found as a fact that the petitioner left Brookline in 1887, and went to Newcastle, intending to make the last named place his permanent home, and that he did this with an honest intention to change his domicil or permanent residence from Brookline to Newcastle, with the intention also of making the latter the place of his permanent and real home, as distinguished from a mere place of summer resort, and further that, down to the time of the assessment of the tax in 1899, the petitioner had not returned to Brookline with the intention of leaving Newcastle and making Brookline his permanent home.

The respondent made fifteen requests for rulings, all of which were given except four, and one of these was waived; and the case is before us upon the respondent's exceptions to the refusal to give the other three rulings, namely the ninth, eleventh and twelfth.

The ninth request is to the effect that the facts that the petitioner, in September, 1886, and on March 12, 1887, notified the selectmen of Newcastle, Maine, of his intention to become a resident of that town, are incompetent, immaterial and inadmissible. It is very clear that this instruction could not be given as a whole. While the fact that he gave the notification in September, 1886, might well have been excluded as immaterial, yet that given on March 12, 1887, a few weeks before he left Brookline and took up his abode in Newcastle was admissible as qualifying and giving character to the act done. *Thorndike* v. *Boston*, 1 Met. 242. *Kilburn* v. *Bennett*, 3 Met. 199. *Cole* v. *Cheshire*, 1 Gray, 441. *Viles* v. *Waltham*, 157 Mass. 542. As the respondent did not ask for a separate ruling as to the declaration of September, 1886, the exception must be overruled.

The eleventh ruling requested is as follows: "Upon all the evidence in the case, the court would not be justified, as matter of law, in finding for the petitioner, or in ordering an abatement of any part of the tax assessed upon him, or in ordering judgment in his favor." The admitted facts in the case are not numerous and may be briefly stated. On May 1, 1899, the

petitioner was the owner of a house and estate in Brookline, of about sixty-six acres, and had owned the same since 1883. Until 1887, he had made it his legal residence. For several years before that time he had passed a short time in Newcastle every summer, not more than eight weeks in any year. In 1889, he bought and has since owned an estate in Newcastle, of eleven and a half acres, on which are a house, stable, and farm barn. This house, as well as the house in Brookline, is fully furnished and suitable for winter and summer use. The petitioner has a library and family portraits in each house; but the main library and collection of pictures is in Brookline. From 1887 to 1889, the petitioner, with his family, lived, while at Newcastle, in a house given him rent free by his father-in-law. Since 1883, the petitioner has belonged to a church at Newcastle, and has neither attended nor belonged to a church at Brookline, although he is a member of a church in Boston. From 1887, the house at Brookline has been closed in the summer months, except that a woman, acting as care taker, has slept in the rear of the house; and the petitioner did not spend any time at Brookline while his family was at Newcastle. In March, 1887, the petitioner notified the selectmen of Newcastle of his intention to become a citizen of that town, and in April he notified the authorities of Brookline of his change of residence, moved himself and family to Newcastle, and was occupying his house there on the last day of April and the first day of May in that year. It was admitted that the plaintiff would testify that he removed to Newcastle with the intention of making that house his home. He voted in Newcastle at every Presidential and State election from 1887 to the present time. From April, 1887, to July, 1889, the petitioner went to Newcastle with his family each year in April, remaining there several weeks. He was again in Newcastle every summer for two or three months, and off and on at other times in each year. From July, 1889, to 1893, he was at Newcastle with his family one half and more of each year. Since 1893, he and his family have been in Newcastle every summer, from July to October or later; in 1897, from July until late in November; also in December, 1898, and in January, 1899. In the last named month he returned to Brookline and occupied his house there until about July 1, 1899.

From 1887 to 1894, both inclusive, the petitioner's name appears in the Boston Directory as follows: "Charles P. Gardiner, 2 Pemberton Sq. room 13, h. at Brookline." From 1895 to 1899, both inclusive, the petitioner's name appears in said directory as follows: "Charles P. Gardiner, 19 Pemberton Sq. room 13, h. at Brookline." The petitioner knew that his name so appeared, and made no objection.

As the judge who heard the case in the court below has made a finding of fact in favor of the petitioner, the only question before us is whether he was warranted in so finding. The case was submitted to him on certain facts admitted to be true, subject to their competency and materiality, and he also had the power expressly given him to draw such conclusions of fact from such of the facts as were competent and material, as might be necessary for a decision of the cause. The judge excluded many admitted facts, at the request of the respondent, and these we have not stated. We have no doubt that his finding in favor of the petitioner was fully warranted.

"The question what constitutes domicil is mainly a question of fact, and the element of intention enters into it." *Olivieri* v. *Atkinson*, 168 Mass. 28. See also *Wright* v. *Boston*, 126 Mass. 161, 163.

If a man owns land in two towns, he may determine where his home shall be, and thus incidentally where he shall be taxed. *Fisk* v. *Chester*, 8 Gray, 506. He may even change his domicil from one town to another merely because he wishes to diminish the amount of his taxes. *Draper* v. *Hatfield*, 124 Mass. 53. Nor is there anything in law which prevents his living in two States in different parts of the year, although he can have but one domicil.

The petitioner's evidence that he intended to change his domicil was believed by the judge, and this was accompanied by the physical facts above set forth; and on the whole evidence it cannot be said, as matter of law, that the finding was wrong. If a change of domicil had been effected, the fact that the petitioner was in Brookline on the first day of May is of no consequence.

The twelfth request for instructions was refused, as the judge has expressly stated, because of his finding of fact which we

have already set forth; and the counsel for the respondent at the argument very properly stated that he could not press his exception to the refusal to give the instruction requested.

Exceptions overruled.

MARIA L. BALDWIN *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. December 3, 1901. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Way, By prescription, extent of easement.

When a right of way has been acquired by prescription over a path steep in grade and during the whole of the use a railing has been maintained there reasonably necessary to the convenient use of the path in the winter season, the easement is the right not only to use the path but to use it with the railing.

The plaintiff had a right of way by prescription from a gate in his back fence along a path over the defendant's land to a railroad station of the defendant. When the right was acquired there was one dwelling house on the plaintiff's lot. The plaintiff built on the lot two additional houses with two tenements in each. The defendant denied the right of the plaintiff's tenants to use the path. *Held*, that the character of the use had not changed, and a finding was justified, that no additional burden was imposed on the land of the defendant by the increased number of persons using the path in the same way.

BILL IN EQUITY, filed January 19, 1901, to restrain the obstruction of an alleged right of way by prescription from a gate in the plaintiff's back fence along a path over the defendant's land to a railroad station of the defendant in Somerville.

In the Superior Court the case was heard by *Braley*, J., without a jury. He found that the plaintiff was entitled to a footway or path from her land along the location of the defendant of at least two feet and six inches in width with a gutter upon the side next to her land, and a railing on the side next to the railroad track at least forty-six inches high as theretofore constructed, and to enter upon the path by a gate, the path or footway running between the gate in the fence on the rear line of the plaintiff's land next to the railroad location and thence along the location to the edge of the concrete next the defendant's station.

The defendant asked the judge to find and rule, that the

tenants of the plaintiff occupying the apartment houses constructed by the plaintiff on her land were not entitled to the use of the way, and that the use of the way was confined to the plaintiff and those succeeding to her rights in the estate as it existed in 1869 at the time when the dwelling house was built and occupied by herself and husband and those who might live with them in the dwelling house. The judge declined so to find and rule, and held that the way was appurtenant to the estate of the plaintiff and to each and every part of it, and that there had been no change in the character of the use of it, and that no greater burden had been imposed on the servient estate, and entered a decree accordingly. The defendant appealed.

E. J. Rich, for the defendant.

S. C. Darling, for the plaintiff.

HAMMOND, J. 1. The judge found that the grade of the path from the gate in the plaintiff's fence to the railroad station was steep, that in the winter it was somewhat difficult to use it, when icy, without a railing, and that from the time when the path was first used there was a railing there not less than forty-six inches in height. We cannot say that on the evidence the finding was wrong. Since, therefore, the railing was reasonably necessary to the convenient use of the path in the winter season, and was continually kept there, the easement acquired was not only to use the path, but to use it with the railing. The right to the maintenance of the rail was under the circumstances a part of the easement.

2. The more difficult question is as to the extent of the easement. The lot of the plaintiff had a frontage upon the street of one hundred and twelve and one half feet, extended in the rear the same distance on the line of the railroad, and had a depth of about one hundred and eighty-eight feet. Prior to 1895, there were upon it only two buildings, a dwelling house which was occupied by one family, and a stable; and it may be inferred that the whole lot was used in connection with these buildings. Recently, two houses, each having two tenements, were built on the lot, one in 1895 and the other in 1897, so that there are now upon it these three dwelling houses and a stable. The question is whether the right of way is such that it may be used by the tenants of the new houses.

It is a way by prescription. In the case of a way by grant, the nature and extent of the easement is determined of course by the language of the grant construed in the light of the attending circumstances. In the case of a way by prescription, however, there is no language to guide us, and resort must be had to some other test. Since prescription presupposes a grant which is lost, the proof of the nature of the grant is to be found in use, and it is frequently stated in some form of language that the nature of the right acquired by use is measured and limited by the nature of the actual use. Thus it is said by Morton, J., in *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344, 449: "The right presumed to be granted is co-extensive with the use"; by Bigelow, J., in *Atwater* v. *Bodfish*, 11 Gray, 150, 152: "It must be limited to the use for which it is shown by the evidence to have been originally designed," and in *Richardson* v. *Pond*, 15 Gray, 387, 390: "The common and ordinary use which establishes the right also limits and qualifies it"; and by Finch, J., in *American Bank Note Co.* v. *New York Elevated Railroad*, 129 N. Y. 252, 266: "The right derived from user can never outrun or exceed the user in which it had its origin." It is plain that if the doctrine is to be taken strictly, then the right must be confined to the very persons who have passed over the way, and in the case of a carriage way, as stated by Parke, B. in *Cowling* v. *Higginson*, 4 M. & W. 245, the right would "be confined to the identical carriages that have previously been used upon the road, and would not warrant even the slightest alteration in the carriage or the loading, or the purpose for which it was used."

No one would contend for so strict a construction; and, as stated by the same judge in the same case, the truth is that one "must generalize to some extent." As in the case of a grant the language is to be construed in the light of the circumstances, so in the case of prescription the use is to be looked at in the same way. The nature of the right is not to be determined by the actual proved use alone, but by that in connection with the circumstances. If, for instance, it be proved that the way had been used for all purposes required by the person claiming it, that would be evidence of a general right. *Parks* v. *Bishop*, 120 Mass. 340.

It is to be noted that we are not dealing with a case in which there is any physical change in the kind of use of the way. It is a footway and nothing else. So far as respects the burden upon the servient tenement, it is immaterial whether the person using the way goes to one house or the other after passing through the gate. Each house is situated upon the land as it existed when the use began. The lot is the same, is small in size, and there never can be many dwelling houses upon it. The only change is that five families live there now instead of one, and the only change proposed in the use of the way is that more pedestrians may use it than before, but for the same purposes as before.

The case is therefore distinguishable from cases like *Ballard* v. *Dyson*, 1 Taunt. 279, where it was held that under the peculiar circumstances the use of a way for driving carts and pigs to the slaughter house of the plaintiff did not necessarily, as matter of law, show that such use was broad enough to give the right to drive horned cattle to the same, or *Cowling* v. *Higginson*, 4 M. & W. 245, where it was held that the proof of a user for farming purposes did not necessarily prove a right of user for the purpose of conveying coals, the products of a mine lying under the farm, or like *Atwater* v. *Bodfish*, 11 Gray, 150, where it was held that a right to use a way for the purpose of carting wood from a lot when in a wild and uncultivated state could not be extended to a larger use. In such cases there is an actual change in the physical objects passing over the road.

There is a class of cases, however, to which the above are analogous, and with which they are more or less intertwined, in which there is a change in the use of the dominant estate, as where a way has been used to carry off wood from wild land which is afterwards cultivated and built upon, or a way has been used for agricultural purposes to a farm which is afterwards turned into sites for manufacturing purposes, or mined for its ores, or divided into house lots. Here the change is radical and the right of way cannot be used for the new purposes required by the altered condition of the property. *Wimbledon & Putney Commons Conservators* v. *Dixon*, 1 Ch. D. 362. *Williams* v. *James*, L. R. 2 C. P. 577. *Atwater* v. *Bodfish*, *ubi supra*. But in all these cases there has been a substantial

change in the nature of the use, and a consequent increase of burden upon the servient estate.

In the case before us the judge has found that there has been no such increase. No case has been shown to us nor are we aware of any, where the change in the use of the land has been only in degree and not in kind, in which it has been held that the way could not be used to the land in the changed condition, especially if there was no increased burden upon the servient estate. To base a distinction upon such a change would be unwise in theory and impracticable in practice.

The judge before whom the case was tried found that there was no increase of burden. Under the circumstances the way once established must be held to be a way to the very same lot of land while used for the same general purposes as when the way was acquired.

Decree affirmed.

FRANK S. HAM *vs.* JENNIE S. TWOMBLY.
MARY J. HAM *vs.* SAME.

Middlesex. January 8, 1902. — April 2, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Trust. Equity Jurisdiction, Illegal secret trust, Plaintiff's own fraud. *Divorce*, Collusion. *Devise.*

Semble, that extrinsic evidence of an agreement between a devisee and a testator is admissible to show a secret trust as well where there is an inconsistent express trust as where the devise is upon its face absolute.

Semble, that to set aside a devise on the ground that it was upon a secret trust for an illegal purpose the remedy is in equity exclusively.

Semble, that one claiming under an heir at law of a testator cannot maintain a bill in equity to set aside a devise on the ground that it was inserted in the will by the fraudulent procurement for an unlawful purpose of the heir at law under whom he claims.

If a wife in good faith undertakes to procure a divorce to which she legally is entitled upon the ground of adultery already committed by her husband and to prevent unnecessary publicity or scandal her husband agrees with her as to the amount of alimony and the expense to be incurred for witnesses, this does not make a divorce so obtained collusive or fraudulent.

A testator devised land to F. H., his sole heir at law, in trust to pay to J. T. such part of the income as he saw fit until the death or divorce of F. H.'s wife, and

upon the termination of the trust during his life to F. H. absolutely, or if F. H. died before the death or divorce of his wife then to J. T. F. H. died before either the death or divorce of his wife. On a writ of entry by the heir at law of F. H. and a writ of dower by his widow against J. T., to set aside the devise on the ground that it was fraudulently procured by F. H. upon a secret trust for an illegal purpose, it was *held*, that even if there were a remedy at law in such a case, and if one claiming under F. H. could prevail by reason of F. H.'s fraud, and if the trust was illegal, still the illegal trust terminated with the death of F. H. and the remainder to J. T. was not affected by it.

WRIT OF ENTRY, dated July 20, 1899, by Frank S. Ham, son and heir at law of Foster Ham, and WRIT OF DOWER of the same date by Mary Jane Ham, widow of Foster, against Jennie S. Twombly, devisee under the will of Cyrus Ham, father of Foster.

In the Superior Court *Lawton*, J. ordered a verdict for the tenant; and the demandants alleged exceptions. The sixth clause of the will of Cyrus Ham, under which the tenant claimed, is printed in *Cowley* v. *Twombly*, 173 Mass. 393.

C. Cowley & J. S. Patton, for the demandants.

N. D. Pratt, for the tenant.

HAMMOND, J. These two cases were argued together. In each the title of the tenant is founded upon the sixth clause of the will of Cyrus Ham, who died seised of the land in controversy. The demandants are respectively the heir at law and the widow of the Foster Ham named in that clause. It already has been decided that, so far as appears upon its face, the clause is valid. *Cowley* v. *Twombly*, 173 Mass. 393.

The demandants however contend that it is invalid because, as they allege, there was an unlawful secret trust. As to this trust they offered at the trial "to prove, by evidence extrinsic to the will of Cyrus Ham, that the sixth clause of said will was inserted therein by the procurement of his son, Foster Ham, and that it was said Foster Ham's purpose and intention thereby to bring about a final separation between himself and his wife, Mary Jane Ham, and to induce her, for a pecuniary consideration, to be paid by him to her out of the estate mentioned in said sixth clause, to procure a divorce from him, for the crime of adultery committed by him, and upon evidence to be furnished by him and at his expense; and that said Cyrus Ham, when he executed said will, knew that such was said Foster Ham's pur-

pose and intention; and that such was also the purpose and intention of said Cyrus Ham."

This evidence was excluded, and the only question is whether this was error prejudicial to the demandants.

The position of the demandants is that the purpose of both the testator and his son Foster was to induce the latter's wife to procure a divorce by collusive, fraudulent and corrupt methods; that such a purpose is a fraud upon the law; that, unless its existence can be shown by evidence extrinsic to the will, the law is compelled to give force and effect to a fraud upon itself; that to prevent such a result such evidence is admissible; and that when the fraud is thus shown the estate of the devisee is merely a dry trust for the benefit of the heirs at law or other persons to whom the estate would have gone in the absence of such a devise.

Undoubtedly it is well settled that, where a devise is upon its face absolute, extrinsic evidence is admissible to show an agreement between the testator and the devisee that it is upon a secret trust, and also the nature of the trust. If the trust is lawful, then the devisee holds the property in trust in accordance with the agreement, but, if it is unlawful, then he holds it for the benefit of the heirs at law or other persons to whom the property would have gone in the absence of such a devise. These principles are established to prevent a fraud upon the testator and the objects of his bounty in the first supposed case, and a fraud upon him and the law in the second. The authorities are numerous and conclusive. The following are very instructive on this point. *Jones* v. *Bodley*, L. R. 3 Eq. 635. *Tee* v. *Ferris*, 2 K. & J. 357. *O'Hara* v. *Dudley*, 95 N. Y. 403. *Amherst College* v. *Ritch*, 151 N. Y. 282. *Fairchild* v. *Edson*, 154 N. Y. 199. And we see no reason why the same principles should not be applied to a case where the devise is not absolute but upon a trust which is inconsistent with the secret trust. The validity and effect of the devise in such a case is to be determined by the nature of the secret trust, and not of the expressed trust.

It is to be observed, however, that due effect is to be given to the operation of the will. As was well said by Vann, J. in *Amherst College* v. *Ritch*, 151 N. Y. 282, 324, "The trust does

not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee *ex maleficio*, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved, but to promote justice and prevent wrong the courts compel the legatee to dispose of his gift in accordance with equity and good conscience." Where the trust is illegal the same principles must be applicable, *mutatis mutandis*, to the trust in favor of the heir at law. The legal estate passes to the devisee, and the rights of the *cestui que trust* are to be worked out in proceedings in equity and not at law.

It is also to be noted that in this case the heir at law, to whom as *cestui que trust* the estate would have gone if there had been no devise, was Foster Ham himself, the very person who joined with the testator to commit a fraud upon the law. If, therefore, during his lifetime, he had come into a court of equity to establish a trust in his favor as heir at law, his first step would have been to show his own active participation in the very fraud upon the law, upon the existence of which would rest whatever right he had to relief in equity.

It is further to be observed that it is doubtful, to say the least, whether the offer shows necessarily an illegal agreement. If, as urged by the demandants, it is to be interpreted as meaning that it was a part of the agreement that the adultery should be committed thereafter by Foster so that his wife could obtain a divorce, and that she should be induced to apply for a divorce for that act, then of course the agreement was illegal. But if, as urged by the tenant, the proper construction is that the agreement was that she should undertake in good faith to procure a divorce to which she was legally entitled upon the ground of adultery already committed by him, and that to prevent un-

necessary publicity or scandal he should agree with her as to the amount of alimony and the expense to be paid for witnesses rather than to compel her to resort to a court to have the amount fixed by decree, and all this was to be done under the eye or with the knowledge of the court, then there was nothing collusive or fraudulent about the suit for divorce, either in the cause or the manner of its prosecution. 2 Bish. Mar. & Div. §§ 249, 252, and cases therein cited.

But whether the remedy in equity is exclusive, or whether the devisee and those claiming under him are barred by the fact that he was the heir at law, or whether the offer of proof as properly construed is sufficient to warrant the finding of an illegal agreement, it is not necessary to decide, because, even if all these be assumed in favor of the demandants, there still remains one fatal defect in their case.

The legal effect of the language of the will is that Foster Ham shall hold certain property, including the land in controversy, in trust until the death or divorce of his wife. Upon such death or divorce he may, and, within ten years thereafter, he must, terminate the trust. During the existence of the trust he may at his discretion pay to Jennie S. Twombly such part of the income as he sees fit, and upon the termination of the trust during his life he is to become the absolute owner of all the property then remaining. If he dies before the death or divorce of his wife, then the trust ceases and the whole fund goes absolutely to Mrs. Twombly. He died before either the death or divorce of his wife, and Mrs. Twombly survived him and took possession of the property under the devise to her.

Even if the secret trust was illegal, it is plain that the trust was to last only during the lifetime of Foster, and the illegality was to end with his death. Neither the testator nor the son intended that the devise in remainder should be accompanied by any trust whatever, express or implied, open or secret. So far, therefore, as respects Mrs. Twombly, the case is not within the principles above stated as to secret trusts. As between her and the demandants there is no such trust attached to the devise in remainder upon which to base any equitable right. By the face of the will she took a legal estate free of trust. The offer of proof is insufficient to show a secret trust as to her interest.

It follows that the measure of her right is determined by the face of the will.

This result is in no way a fraud upon the testator nor upon the law, but on the contrary is in accordance with his wishes and is consistent with law. See the cases above cited.

We have not considered the exception to the exclusion of the other evidence in the first case, because it was waived at the argument.

Exceptions overruled.

REBECCA COLES *vs.* INHABITANTS OF REVERE.

Suffolk. January 13, 1902. — April 2, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Way, Defect in highway.

The absence of a guard or barrier on the top of a wall which is level with a highway, the land beyond being about three feet lower, opposite a place where a stone crusher and quarry are operated, may be found to constitute a defect in the highway.

If a horse shied from fright but his driver instantly would have regained control of him had there been a barrier to prevent his going over the top of a wall on a level with the highway, a town may be found to be liable for an injury to the driver caused by the absence of such a barrier, if it ought to have maintained one there, whether the horse was frightened through the negligence of a third person or otherwise.

TORT for injuries from an accident caused by an alleged defect in Salem Street in the town of Revere, consisting of the absence of a sufficient barrier. Writ dated June 29, 1898.

At the trial in the Superior Court before *Maynard*, J., it appeared by the plaintiff's evidence, that on October 25, 1897, the plaintiff was driving with her son on Salem Street, a highway of the defendant, and had reached a point nearly opposite a large ledge about one hundred feet high upon which was a stone crusher and quarry; that Salem Street at this point was about fifty feet wide; that there were two strips of the street reserved for sidewalks, but no regular sidewalk had been constructed; that the travelled way was about thirty-five feet wide and the

centre of the travelled way was occupied by a street railway company's tracks which left about fourteen feet of the travelled way on each side of the tracks; that the horse was travelling at a pace a little faster than a walk, six or seven miles an hour, and as the team approached the ledge some men working on the top of the ledge, employed by one Burnett the owner of the stone quarry, loosened a large stone weighing several tons and started it rolling down the slope of the ledge toward the street; that the stone made a loud noise in coming down the ledge and when it reached the base struck another stone and made a loud report; that the plaintiff's horse became frightened and went over the sidewalk and over the wall; that at the point where the horse went over, the land on the other side of the wall was between two feet nine inches and three feet lower than the surface of the street or sidewalk; that the top of the wall was on a level with the surface of the street; and that there was no railing or barrier. It was agreed, that due notice of the time, place and cause of the accident was given to the defendant.

At the close of the evidence the defendant requested the following rulings: "1. That on the whole evidence the plaintiff is not entitled to recover, and the verdict must be for the defendant. 2. If the accident was in any degree caused by the neglect of a third person, the verdict must be for the defendant. 3. If the injury was caused by the combined effect of the unsafe condition of the highway and the negligence or careless act of a third person, the plaintiff is not entitled to recover, and the verdict must be for the defendant. 4. If the act of Mr. Burnett in causing the stone to be thrown down in front of the team driven by the plaintiff was careless or negligent and this act caused the injury complained of, the plaintiff cannot recover and the verdict must be for the defendant."

The judge refused to give the first and fourth of these rulings in any form, and refused to give the second and third in the form requested.

The judge, among other instructions, gave the following: "It is necessary, in order to enable the plaintiff to recover, that the defect in the highway should have been the sole cause of the accident, no other cause contributing thereto. If before the ac-

cident the horse, from any cause, became actually uncontrollable and was so when the accident occurred, the plaintiff cannot recover. But if there was only a momentary loss of control, and the control of the animal would have been instantly regained if the vehicle had not come in contact with the defect in the way, then the plaintiff may recover.

"There is where one of the contests is in this case. If there was only a momentary loss of control, and the control of the animal would have been instantly regained, and the accident have been averted, if there had been a proper barrier here, then that fact would not prevent the plaintiff from recovering. . . . I will say right here, it does not make any difference what caused the fright of the horse; whether something in the road, or something outside of the road; that is not the question; but the question is whether or not, so far as the horse was concerned, it was simply momentary, and that this person would have regained the control of the horse, had it not been for the defect."

The judge also said: "In the first place, taking the road as it was, was there a defect? That depends upon all the conditions and the circumstances. Had the officers of the town, whose duty it is to look after the roads, had they — taking everything into account, what was going on there, and the surroundings, and the amount of travel — had they any reason to apprehend that anybody in the exercise of due care would come to any harm? If they had not, then there was no defect. If they had, there was a defect."

The jury returned a verdict for the plaintiff in the sum of $850; and the defendant alleged exceptions.

S. R. Cutler, (*H. W. James* with him,) for the defendant.

R. L. Sisk, for the plaintiff.

HAMMOND, J. Upon the evidence, the questions whether the horse was driven with due care, whether the way was defective by reason of the absence of a barrier, whether the loss of control of the horse was only momentary and would have been instantly regained if the vehicle had not reached the defective spot, and the accident, if there had been a proper barrier, would have been avoided, and whether the defect was the sole cause of the injury, were all for the jury. There was no error in the manner in which the court dealt with the rulings requested by the de-

fendant. The instructions under which the case was submitted to the jury were full and correct. *Hinckley* v. *Somerset*, 145 Mass. 326. *Tisdale* v. *Bridgewater*, 167 Mass. 248, 250.

Exceptions overruled.

ANNIE HARRINGTON *vs.* ANNA E. DOUGLAS.
ROBERT A. HARRINGTON *vs.* SAME.
ROBERT A. HARRINGTON, administrator, *vs.* SAME.
HELEN HARRINGTON *vs.* SAME.

Middlesex. January 20, 1902. — April 2, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Landlord and Tenant. Deceit.

In an action of tort for inducing the plaintiff to hire a certain tenement by false representations of the defendant's agent that the drainage was in good condition, the plaintiff objected to the charge to the jury as instructing them that in order for the plaintiff to prevail the representations must have been the sole inducement to the contract of hiring. *Held*, that, properly interpreted, the judge's charge meant, that the representations must have been one of the inducements, and so interpreted was right.

FOUR ACTIONS OF TORT, by three members of the same family and the administrator of another, deceased, for alleged false representations made by one Hancock, agent of the defendant, that a certain tenement at 22 Austin Street in Cambridge was in good condition as to drainage and plumbing, thereby inducing the plaintiffs to occupy it, in consequence of which three of the plaintiffs were alleged to have suffered from illness and the intestate of the other to have died, with a second count in each case alleging negligence of the defendant in not informing the plaintiffs of the unsanitary condition of the house, and a third count for alleged negligence in not making repairs after notice of its unsanitary condition. Writs dated February 15, 1900.

At the trial in the Superior Court before *Hardy*, J., the jury returned verdicts for the defendant in all the cases; and the plaintiffs alleged exceptions.

The plaintiffs' first and second requests for rulings, held by the court to have been given in substance, were as follows:

"1. As the defendant left the entire care of the property in question to her co-trustee, Mr. Holmes, such notice of a defective condition of the closet as was given said co-trustee Holmes, if any, was notice to the defendant.

"2. Knowledge or lack of knowledge on the part of the defendant's agent that said house was in a defective or dangerous condition is of no consequence if he made the alleged representations. The plaintiffs are not required to show that he had knowledge; nor are they required to show that he was without knowledge; it is enough if he made representations which were not in fact true."

W. P. Hale, for the plaintiffs.

E. H. Jose, for the defendant.

HAMMOND, J. The first and second rulings requested, although not given in the exact language of the requests, were given in substance, and that was enough.

The only remaining exception relates to the question of inducement. One of the contentions of the plaintiffs was that Hancock, the agent of the defendant, made certain false representations concerning the sanitary condition of the tenement, by which the tenant Harrington was induced to hire it. The evidence as to whether such representations were made was conflicting, but would warrant a finding that they were made, and that the tenant, relying upon them, was thereby induced to hire the premises.

The objection made by the plaintiffs to the charge to the jury is that they were instructed that, in order to recover, these representations must have been the sole inducement to the contract of hiring. Such an instruction, as is justly remarked by the counsel for the plaintiffs, would be in conflict with one of the elementary and most familiar principles of the law of deceit, and one would therefore hardly expect it to be given.

While one or two sentences in the charge, considered apart from their setting, might give some ground for the contention that such an instruction was given, yet upon a consideration of the charge as a whole we think it manifest that no such thing was in the mind of the judge, and that the effect of the whole

charge was to leave it to the jury, so far as material to this point, to find for the plaintiffs, if the representations formed one of the inducements.

It is to be noted that it does not appear from the bill of exceptions that among the requests for instructions submitted by the plaintiffs at the close of the evidence there was anything relating to this point. It appears, however, that at the conclusion of the charge the counsel for the plaintiffs saved an exception to the instructions of the judge as to the representations alleged to have been made by the agent, Hancock, pointing out that the law does not require such representations to be the sole inducement as laid down by the judge, but only one of the inducements which led the plaintiffs to take the house; and that the judge declined to change his instructions. He probably declined to change his instructions because he did not accede to the interpretation placed upon them in this respect by the counsel for the plaintiffs.

He had in fact touched upon the matter of the inducement several times, and he was endeavoring to distinguish between an inducement based upon the representations of Hancock and an inducement based upon their own knowledge; and the whole general effect of the charge upon this point was to say in substance that, if the plaintiffs chose to rely upon their own knowledge, then they assumed the risk of the occupation of the premises, and, although the representations may have been made, yet the plaintiffs would not be entitled to recover if they relied upon their own knowledge and not upon the representations.

Exceptions overruled.

RICHARD HOLMES & others *vs.* JOHN E. HUMPHREYS.

Suffolk. March 4, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Mechanic's Lien, Enforcement of bond to dissolve lien, parties. *Practice, Civil*, Parties.

The respondent to a petition to enforce a mechanic's lien filed a bond signed by himself as principal and by three sureties, to dissolve the lien under the provisions of Pub. Sts. c. 191, §§ 42, 43. Later he conveyed away all his interest in the real estate which had been subject to the lien. He then died intestate and the administrator of his estate filed a final account, which was allowed, by which it appeared that there were no assets. Later the administrator died. Nine years after the filing of the original petition, a motion was made that the present owners of the real estate, the sureties on the bond and the heirs at law of the respondent be summoned in to take on themselves the defence of the suit. This motion was allowed only as to the heirs at law, who appeared and answered. The case was reported to this court on the question whether the case was ripe for further proceedings without summoning other parties as respondents. *Held*, that the proceedings must be stayed until the proper parties had been summoned to appear and defend; that the case should then proceed for the purpose of enforcing the judgment obtained by a suit on the bond, and that the principal and sureties on the bond stood in the place that would have been held by the heirs and assignees of the original respondent if the lien had not been discharged by giving the bond; therefore that the heirs at law and the present owners of the real estate had no interest in the suit, which should be against the administrator of the principal and the sureties on the bond. *Whether*, the estate of the principal having been without assets and finally settled and the administrator being dead, if an administrator *de bonis non* could not be appointed, the case might proceed against the sureties alone when made parties, was not before the court and therefore not passed upon.

KNOWLTON, J. This is a petition to enforce a mechanic's lien upon land and a building for labor and materials furnished in the erection of the building. The petition was filed on March 7, 1891, the certificate having been filed on January 7, 1891. On February 9, 1891, a bond was filed in the registry of deeds, signed by the respondent Humphreys as principal, with three sureties, to dissolve the lien in accordance with the provisions of the R. L. c. 197, § 28, then found in the Pub. Sts. c. 191, §§ 42, 43. The condition of this bond is to pay the petitioners within thirty days after final judgment, $35,000, or so much thereof as may be necessary to satisfy the amount for

which the property may be found to be subject to such lien. On May 12, 1891, the respondent conveyed away all his right, title and interest in the real estate aforesaid, and on the same day he died intestate, leaving as his next of kin three children living in the State of Illinois, and no heirs or next of kin within this Commonwealth. On October 26, 1892, the public administrator for the county of Norfolk was duly appointed administrator of his estate, and on November 21, 1894, the administrator's final account was allowed, by which it appeared that there were no assets. On January 20, 1898, the administrator died.

On August 2, 1893, a suggestion of the death of the respondent was filed in this case, and no further proceedings were taken until March 26, 1900, when a motion was made that the present owners of the real estate, the sureties on the above-mentioned bond, and the heirs at law of the respondent, be summoned to appear and take on themselves the defence of the suit. The motion was allowed as to the heirs at law, and denied as to the owners of the real estate and the sureties on the bond. The heirs at law appeared and answered, and a motion was then made to refer the case to an auditor. The judge found that the case was of such a kind as should be heard by an auditor, and ruled that proper parties were before the court for further proceedings by the petitioners to obtain judgment, and reported to this court the question whether the case is now ripe for further proceedings without summoning other parties as respondents.

The attorney for the sureties upon the bond has argued before us as *amicus curiæ* that the respondent's heirs at law are not proper parties to represent the interests of those whom the petitioners seek to hold liable. The real estate was conveyed away by the respondent in his lifetime, his estate has been duly settled by the public administrator, no assets passed to his heirs, and so far as appears they have no interest to defend the suit. Since the lien was dissolved by giving a bond, the real estate has been free from that incumbrance, and the persons to whom it was conveyed cannot be affected by the proceedings in this case. The only persons interested to defend the suit are the sureties on the bond. The bond, under the statute, stands in the place of the real estate as security for the petitioners' claim. The case should proceed to trial and judgment in the usual way, for

the purpose of enforcing the judgment by a suit on the bond, instead of by a sale of the land. In suits to enforce a claim for a mechanic's lien, two interests properly are represented in defence; first the interest of the person primarily liable for the debt sought to be collected, and secondly the interest of the owners of the property upon which the lien is claimed. The statute which is invoked by the petitioners is R. L. c. 197, § 22, which provides that on the death of the respondent in a case like this, the petition "may be prosecuted against his executor, administrator, heirs or assigns as if the estate or interest had been mortgaged to secure the debt." The petitioners contend that the petition may be prosecuted against any of these parties, and that therefore the case may go on against the heirs alone, although they have no possible interest in it. The true meaning of the provision is, as we understand it, that the petition may be prosecuted against such of the parties mentioned as properly represent the interest to be affected. In a case like the present there is no doubt that the executor or administrator is a proper person to be summoned in as respondent. He represents the primary liability for the debt and he should have an opportunity to defend the suit. Inasmuch as the bond stands in the place of the land, he also, as principal, represents the security to be affected if the lien is established. In both relations he is interested, and he should be summoned to appear. The principal and sureties on the bond stand in the place that would be held by the heirs or assigns if the lien had not been discharged. In that relation, not as representing the primary liability for the debt, but as representing the security which is to be used to pay the debt if the lien is established, we are of opinion that they should have an opportunity to be heard as to the validity of the lien, and that at least in the absence of the administrator as a party, the sureties should be summoned before the suit can proceed further. Whether facts exist which make it possible to procure the appointment of an administrator *de bonis non* who can be summoned into court, we do not know; if not, and if on this account the petitioners were to lose their claim, it would be the result of their own negligence in allowing so many years to elapse without action. It may be, but upon this we express no opinion, for the matter is not now before us for adjudication,

that as there were no assets in the estate of the respondent, and as his estate has been settled and his administrator has deceased, and no interest of his estate can now be affected by an adjudication either upon his primary liability upon the debt or upon his secondary liability as principal in the bond, that the case may properly go on against the sureties alone, if they are brought into court as parties. The ruling that the suit was ripe for further proceedings without other parties was erroneous. The proceedings must be stayed until all necessary parties have been summoned to appear and defend.

So ordered.

G. P. Wardner, for the petitioners.

T. Hunt, for the owners of the property and the sureties on the bond.

COMMONWEALTH *vs.* JOHN ROGERS & others.

Suffolk. March 4, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Constitutional Law, Caucus laws. *Elections*, Caucus. *Conspiracy*. *Pleading, Criminal*, Indictment. *Practice, Criminal*, Preliminary finding of fact, Exceptions. *Evidence*, Admissions and Confessions, Testimony of fellow conspirator.

Those provisions of the election act, St. 1898, c. 548, which regulate caucuses and voting at them are constitutional.

The provision of St. 1898, c. 548, § 91, that no person having voted in the caucus of one political party shall be entitled to vote or take part in the caucus of another political party within the ensuing twelve months, is valid.

St. 1898, c. 548, § 92, requiring voting lists to be used as check lists in balloting at caucuses, is valid.

A count for conspiracy to procure illegal voting and a count for aiding and abetting illegal voting are for offences similar in their nature, mode of trial and punishment and may be joined in one indictment at common law.

On an indictment for a conspiracy to procure persons to vote at a caucus who were not entitled to vote there, the conspiracy might be completed before any of the persons to be procured had been agreed upon, and the particular nature of the disqualification is not material to the offence and need not be alleged in the indictment.

However it may be as to an indictment for illegal voting, *semble*, that on an indictment for abetting certain persons not entitled to vote in voting at a caucus, it is not necessary to allege the particular disqualification, *but*, if the failure to do so is a defect, it is one of form and can only be taken advantage of by special assignment.

An indictment, for conspiring to procure persons to vote at a certain caucus who were not entitled to vote there, is not bad because under its charges the conspiracy might be to procure votes which were illegal for different reasons under St. 1898, c. 548, §§ 377, 378, and to abet contrary to § 390 of that statute, the offences punished under these sections being different, since the conspiracy alleged is one, and properly might be alleged to intend them all.

Under St. 1899, c. 409, § 10, an indictment, for conspiring to procure persons to vote illegally at a certain caucus, need not state the place of the offence.

On the trial of an indictment for conspiracy to procure persons to vote illegally at a caucus, there is no variance if it appears that when the conspiracy was formed the conspirators did not know any of the persons named in the indictment as the persons to be procured, and that one of them was not spoken to until twelve o'clock on the day of the caucus when all the plans were complete. In such a case the fact that the conspiracy is indictable in its initial stages does not prevent its being indicted in the shape which it ultimately assumes.

If a caucus is called for a certain hour, and, it being known that the regularly elected warden will be absent, a temporary warden is elected a few minutes before the hour named to fill the vacancy and when the caucus opens and thereafter acts as warden, *semble*, that the election of the warden is good under St. 1898, c. 548, § 129, giving the power to fill vacancies "at a caucus." *At any rate*, there is a warden *de facto*, and the votes cast at the caucus will not be affected by the irregularity.

An indictment for aiding and abetting illegal voting at a caucus is none the less sustained because it appears that there were informalities at the caucus, if they did not make the vote of the caucus void.

At the trial of an indictment for a conspiracy to procure persons to vote illegally at a certain caucus, an exception was taken to a refusal to rule, that no unfavorable inference should be drawn against one of the defendants, who acted as *de facto* warden at the caucus, because he delayed for half an hour in opening the caucus, if that delay was on account of the enclosures or pens outside the guard rail. There was independent evidence, that the delay was for the purpose of facilitating the carrying off of certain ballots and giving time to take them to the place where the fraudulent voters were assembled. *Held*, that the ruling rightly was refused.

At the trial of an indictment for a conspiracy to procure persons to vote illegally at a certain caucus, the presiding judge, as the ground for admitting the declarations of one defendant as evidence against the others stated his ruling that there was sufficient evidence of a conspiracy against all the defendants. *Held*, that the ruling was right and the statement of it proper. When a preliminary finding of fact on the part of the judge is necessary for such a purpose there is no duty to conceal it from the jury.

On a trial for conspiracy, declarations of the several defendants, admissible against themselves but not against the others, may be admitted, the jury being cautioned that statements made after the conspiracy had been carried out are admissible only against the party making them.

At the trial of an indictment for a conspiracy to procure persons to vote illegally at a certain caucus, evidence that fraudulent voters were spoken to by one of the conspirators before all of them had come into the scheme is admissible, in connection with proof that the others did come in and by implication adopted the act, and because the usual way of proving a conspiracy is by showing a series of acts on the part of the several defendants all converging to one point.

A remark of a district attorney in the course of a trial is not the subject of exception.

On a trial for conspiracy the weight of the testimony of fellow conspirators properly is left to the jury.

At the trial of an indictment for a conspiracy to procure persons to vote illegally at a certain caucus, it was *held*, that there was sufficient evidence to go to the jury of the guilt of one of the defendants, who was present at the preliminary meetings, which were held in his house, and who contributed money toward the illegal scheme and helped at the time of the caucus.

HOLMES, C. J. This is an indictment in ten counts charging the defendants with conspiring to procure certain persons to vote at a republican caucus, who were not entitled to vote there, and with aiding and abetting certain persons not entitled to vote in illegally voting at the same caucus. Probably in consequence of the number of counsel engaged scarcely a step was taken in the case without objection, and we shall not feel called upon to discuss each of the innumerable exceptions at length or to go much beyond the arguments addressed to us.

A motion to quash was made on behalf of the defendants Winsloe, Newmarch and Lord, and another on behalf of the defendant Rogers. The former raises the question of the constitutionality of those parts of the election act, St. 1898, c. 548, which regulate caucuses and voting at them. The right of the Legislature to pass laws which provide "an easy and reasonable mode of exercising the constitutional right" and which are "calculated to prevent error and fraud, to secure order and regularity in the conduct of elections, and thereby give more security to the right itself," is settled. *Capen* v. *Foster*, 12 Pick. 485, 490. *Kinneen* v. *Wells*, 144 Mass. 497. *Jaquith* v. *Wellesley*, 171 Mass. 138, 143. Here, as elsewhere, (it might be said especially in matters of constitutional law were the fact not universal,) it is vain to point out that the difference upon which a legal distinction is based, — here the difference between seemingly useful or harmless legislation and a clearly void restriction, — is one of degree, and to ask where you are going to draw the line, as is done by the defendants. Some legislation is permissible and necessary. A line between cases differing only in degree is worked out by the gradual approach of the decisions grouped about the opposite poles. Objections, to deserve consideration, must be specific.

The regulations in question provide and govern merely a means by which political parties may get the names of their candidates

printed upon the official ballot, and they must govern if they are to provide them. The statute gives another means by nomination papers. § 140. It does not prevent any one from voting for any other persons than those whose names are printed on the ballot or prevent people from meeting without regard to the statute, concerting their action and preparing pasters to be used upon the ballot. It does not interfere at all with the final vote for State officers, representatives and senators, which it is the most obvious purpose of the Constitution to protect. See *Cole* v. *Tucker*, 164 Mass. 486, 487. We may assume for purposes of decision that legislation for the limited purposes of the sections in question is subject to the protection of the right to vote secured by the Constitution. But if it is, which we do not decide, the remoteness of what it affects from the final vote is to be borne in mind when we have to decide whether it only embodies reasonable precautions or trenches upon political rights. It would be a strange inversion to say that no laws can be passed upon the mode of voting at a preliminary meeting held only for the purpose of getting names printed upon an official ballot when laws can be passed affecting the final vote. The Legislature has a right to attach reasonable conditions to that advantage, if it has a right to grant the advantage. Whether the defendants mean to deny that right or to contend that, if any names are printed those of all possible candidates should be, is not very clear. We see no reason to doubt that the provision for printing names presented by a fixed minimum of voters in the specified way is proper. Indeed that hardly is an open question. It is settled that the rights of others are protected by the provision for blank spaces. *Cole* v. *Tucker*, 164 Mass. 486, 488. Practically it is settled that there is no ground of complaint in the obviously necessary restrictions upon the number of names to be printed. *Miner* v. *Olin*, 159 Mass. 487. The suggestion that it is a hardship upon a voter who can write nothing but his own name is really an objection to the ballot in general, and, with the objection that the statute is class legislation, is disposed of by the cases cited. See further *DeWalt* v. *Bartley*, 146 Penn. St. 529; *Ransom* v. *Black*, 25 Vroom, 446.

One specific objection urged is that by § 91 no person having voted in the caucus of one political party shall be entitled

to vote or take part in the caucus of another political party within the ensuing twelve months. It seems to us impossible to say as matter of law that this is not a reasonable precaution against the fraudulent intrusion of members of a different party for sinister purposes.

It is objected further that an attempt is made to require greater qualifications for voting than are required by the Constitution, by the provision for the use of the voting lists as check lists, and the denial of the right to vote to those whose names do not appear upon the lists. It is suggested that the registration under §§ 36–38 may be closed twenty days before the caucus, so that persons who become qualified in the interim are not allowed to vote. For the purposes of a preliminary meeting, this again does not seem to us an unreasonable precaution, and we cannot say as matter of law that the time allowed is unreasonable. The actual interim presumably will be much less, under the requirement that the registrars hold at least one session on or before the Saturday last preceding the first caucus preceding the annual State election. The provision in § 50 for registering minors who will reach full age before the election day must not be forgotten.

The statute is objected to as requiring illegal taxation because the city or town must bear the expense of the caucuses, and thus taxpayers are made to contribute to the support of a party or parties which they do not approve. The disapproval of a minority does not exempt them from bearing their share of public burdens while they continue to live in a State which they are free to leave. The expense, considered as a whole, is for the purpose of making it easier and more certain that the community shall elect the public officers whom it wants. This is not the less a public purpose that a part of the expenditure necessarily is for the separate convenience of the separate groups out of whose action emerges the expression of the public will.

The motions to quash set up that the indictments are bad on other grounds beside the supposed invalidity of the statute. It is said that there is a misjoinder of counts. But conspiracy to procure illegal voting and aiding and abetting in illegal voting are "similar in their nature, mode of trial, and punishment." *Commonwealth* v. *Leach*, 156 Mass. 99, 101. *Pettes* v. *Common-*

wealth, 126 Mass. 242, 245. The latter is punished by imprisonment in jail not exceeding one year, St. 1898, c. 548, § 390, the former conformably to the common usage and practice in the State, Pub. Sts. c. 215, § 1. (R. L. c. 220, § 4.) In either case imprisonment might be in the house of correction instead of in the jail. Pub. Sts. c. 215, § 3. (R. L. c. 220, § 5.) It was not necessary to aver that the different counts were different descriptions of the same offence. The offences intended to be charged were different, and the joinder was permissible at common law and did not depend upon Pub. Sts. c. 213, § 18. (R. L. c. 218, § 45.) *Commonwealth* v. *Ismahl*, 134 Mass. 201. We see no injustice and no embarrassment in the conduct of their case of which the defendants can complain.

It is said that the first count is bad because it does not show how the persons whom the defendants conspired to procure to vote were not entitled to vote. The allegation embraces persons unknown so that the requirement is impossible, and this illustrates the fact that such a conspiracy might be completed before any of the persons to be procured had been agreed upon. But it follows from that fact that the particular nature of the disqualification is in no way material to the offence. Therefore it seems to us unnecessary to the defence to require it to be alleged. In *United States* v. *Cruikshank*, 92 U. S. 542, the object of the conspiracy was not stated with reasonable certainty. Perhaps it is only another form of words for the same thought to say that the mode of disqualification is a fact one degree more remote than the principal constituent elements of the crime, and that for that reason the disqualification may be alleged in general terms. See cases cited in *May* v. *Wood*, 172 Mass. 11, 15; *State* v. *Marshall*, 45 N. H. 281, 285, 286. There is no doubt that the count set forth a crime at common law. See *Commonwealth* v. *Silsbee*, 9 Mass. 417; *Commonwealth* v. *Hoxey*, 16 Mass. 385; *Commonwealth* v. *McHale*, 97 Penn. St. 397, 408; *Commonwealth* v. *Waterman*, 122 Mass. 43, 57. See further St. 1898, c. 548, § 377.

It may be worth remarking that *Commonwealth* v. *Boynton*, cited in *Commonwealth* v. *Hunt*, Thach. Crim. Cas. 609, 640, and in *Commonwealth* v. *Waterman*, is not an authority, as it appears from the records that the allegation of conspiracy was merely

inducement to an allegation that the goods actually were obtained by the false pretences. Records of Supreme Judicial Court, [Vol. 3] 1803, fol. 82, 83 *a*.

A similar objection is made to the other counts for abetting in voting persons not entitled to vote. This is urged under the fifth reason of Rogers's motion to quash, viz. that the second count alleges no offence and that the other counts are defective, informal and insufficient, and do not set forth with legal precision any offence known to the law; and under similar reasons in the other motion. The defect, if there is one, is formal and should have been assigned specifically. Pub. Sts. c. 214, § 25. *Commonwealth* v. *Donovan*, 170 Mass. 228, 235. If we were to consider the objection, we should be inclined to regard the allegation as sufficient. In addition to what has been said already, the counts follow the language of the statute. St. 1898, c. 548, § 390. *Commonwealth* v. *Connelly*, 163 Mass. 539, 541. The allegation is a mere negative. A few persons are entitled to vote at a given place and time. The rest of the world are not. It seems an excess of formality to require a more detailed denial of the specific marks which constitute a qualification to vote. They all are denied by the phrase "not entitled to vote." However it may be in an indictment for unlawful voting, (and the reasoning in *People* v. *Neil*, 91 Cal. 465, 469, *State* v. *Moore*, 3 Dutcher, 105, 110, and the old precedents on the game laws there cited, does not seem to us convincing,) we are not prepared to make so strict a requirement in an indictment for abetting, notwithstanding the decision in *State* v. *Tweed*, 3 Dutcher, 111. See *Commonwealth* v. *Shaw*, 7 Met. 52; *State* v. *Marshall*, 45 N. H. 281; 2 Whart. Prec. Ind. (4th ed.) 1019; *State* v. *Douglass*, 7 Iowa, 413. If necessary, we might refer also to St. 1899, c. 409, §§ 5, 6, 13, 27; *Commonwealth* v. *Dill*, 160 Mass. 536, 537.

It is argued that the first count is bad because it charges or may charge conspiracy to procure votes which are illegal under either § 377 or § 378, and to abet contrary to § 390. The offences punished in these sections are different, but the conspiracy alleged is one, and properly might be alleged to intend them all. *Commonwealth* v. *O'Brien*, 12 Cush. 84, 92. Compare *Commonwealth* v. *Moody*, 143 Mass. 177. It is punishable to conspire to

procure any kind of unlawful voting, whether it be the voting of an unregistered voter or the voting of one who had voted in the caucus of another party within a year.

The only further observation necessary to be made concerning the motion to quash or the indictment is that by reason of St. 1899, c. 409, § 10, it was not necessary to state the place of the offence, and that this disposes of what otherwise would be the most serious trouble with the first count.

The next proposition argued for the defendants is that the first count was not proved as laid. This conclusion is reached by an odd perversion of the principle that the offence of conspiracy is committed as soon as the combination or agreement is made. It is said that the defendants had made their plot before they knew any of the persons named in the first count as the persons to be procured, and more especially that one of those persons was not spoken to until twelve o'clock on the day of the caucus, when all the plans were complete. No doubt a conspiracy was entered into before it was decided who were the men to be used. But that conspiracy was enlarged with each new item that entered into the plan while it still was on foot, just as it might be enlarged in the number of its members, and, when the men who were to be used for illegal voting were identified as the men gathered in a certain room, the conspiracy became a conspiracy to procure those men to vote. The fact that it was indictable in its more meagre and unfledged form did not prevent its being indicted in the shape which it ultimately assumed. We may admit for the purposes of decision that, under *Commonwealth* v. *Harley*, 7 Met. 506, and *Commonwealth* v. *Kellogg*, 7 Cush. 473, it was necessary to prove the names laid in the count. See *Commonwealth* v. *Meserve*, 154 Mass. 64, 73. But if the men were identified before the plot was over, of course it no more matters that they were not identified by name than it matters in the proof of an indictment for an attempt to kill a certain man that the defendant did not know his name when he shot at him.

It next is argued that the caucus was not legally held, as the jury were instructed that it must be proved to have been in order to sustain the counts for abetting. This is maintained in the first place because the warden was elected a few minutes before four on the ground of a temporary vacancy, whereas the

caucus was called for four o'clock, and, by § 129, the power to fill vacancies is given only "at a caucus." It was known that the regularly elected warden would be absent, so that it would be a strong thing to say that the election was not sufficient when the caucus opened. But at least there was a warden *de facto* and a meeting at which votes were cast effectively. See *Commonwealth* v. *Sullivan*, 165 Mass. 183, 185; *Rounds* v. *Smart*, 71 Maine, 380, 387; Paine, Elections, c. 17. Voters are not to be disfranchised without clear words. *O'Connell* v. *Mathews*, 177 Mass. 518, 521. *Bowers* v. *Smith*, 111 Mo. 45, 55, 56. Paine, Elections, 314, § 368. But if the meeting was effective for the purpose for which it was called, fraudulent voting would accomplish the harm which the law seeks to prevent, and it would be absurd to allow it to go unpunished on the ground of informalities which did not make the vote of the caucus void. The same consideration makes the presence of pens outside the guard rails and of unauthorized persons within them, the possible absence of sufficient booths and the delegation of the duty of arranging two or more lines of voters, § 105, immaterial to the case. *Bowers* v. *Smith*, 111 Mo. 45. *Moyer* v. *Van De Vanter*, 12 Wash. 377, 385. *Simons* v. *People*, 119 Ill. 617. *Drogheda Election Petition*, 9 Ir. L. T. R. 161.

An exception was taken to a refusal to rule that no unfavorable inference should be drawn against Lord, the *de facto* warden, one of the defendants, because he delayed for half an hour in opening the caucus, if that delay was on account of the enclosures or pens outside the guard rail. There was independent evidence that Lord was in the conspiracy, and that it had been suggested that he should facilitate the carrying off of the ballots, which was one part of the scheme. This he could not do until the ballots were delivered to him at the caucus. § 120. After refusing to open the caucus for some time, he did so at once, at about half past four, on a whisper from the defendant Winsloe. There was a fair argument that he agreed to the suggested plan, and made the delay in order to give time for the ballots to be carried over to the place where the fraudulent voters were assembled. The ballots arrived there about five. Further answer to this exception seems unnecessary.

Exceptions were taken on the ground that the presiding judge

charged upon the facts. We deem it unnecessary to discuss the charge. We are of opinion that it was perfectly fair and sedulously avoided expressing the opinion of the judge.

A few general observations will dispose of the argument in support of the many exceptions to evidence. The presiding judge rightly ruled that there was sufficient evidence of a conspiracy against all the defendants. It was proper to make the statement as the ground for admitting declarations of one as evidence against the others. When a preliminary finding of fact is necessary on the part of the judge for such a purpose there is no duty to conceal it from the jury. *Commonwealth* v. *Brown*, 14 Gray, 419, 425, 432. *Commonwealth* v. *Scott*, 123 Mass. 222, 235. The admissibility of the evidence as against the others was made by the charge ultimately dependent upon the finding of a conspiracy by the jury, and they were cautioned to use their own judgment. Declarations of the several defendants properly were admitted as against themselves independent of this ruling and before it. *Commonwealth* v. *Ingraham*, 7 Gray, 46, 47. *Commonwealth* v. *Hunton*, 168 Mass. 130, 132. So far as they might be evidence against the others after a conspiracy was established *aliunde*, there was no necessary order of proof. *Commonwealth* v. *Smith*, 163 Mass. 411, 418. *Commonwealth* v. *Waterman*, 122 Mass. 43, 59. *Regina* v. *Brittain*, 3 Cox C. C. 76, 77. It was proper, too, to call for what was said by the defendants after as well as before the conspiracy had been carried out, and then, if irrelevant matters were mentioned in the answer without special objections, to order those matters not to be considered, as the judge would have done in this case but for the objection of the defendants. He cautioned the jury that after the conspiracy had accomplished its end declarations were admissible only against the party making them. The jury were cautioned in every proper way not to consider evidence admitted only as against one when they were dealing with the case of the others. This was all that could be demanded. *Commonwealth* v. *Ingraham*, 7 Gray, 46. *Commonwealth* v. *Bingham*, 158 Mass. 169, 171. It hardly needs saying that the assumption in a part of the defendants' argument that all evidence of declarations in conspiracy must be admissible against all is unfounded.

Evidence that fraudulent voters were spoken to by one of the

conspirators before all of them had come into the scheme was admissible in connection with the proof that the others did come in and by implication adopted the act. Also the usual way of proving a conspiracy is by showing a series of acts on the part of the several defendants all converging to one point.

The district attorney, when certain evidence was objected to, said: "It is the flight of Ryan I want to show." An exception was noted. But without more it is enough to say that the remark was not subject to exception. *O'Driscoll* v. *Lynn & Boston Railroad*, 180 Mass. 187. *Commonwealth* v. *McConnell*, 162 Mass. 499, 503. *Commonwealth* v. *Peisson*, 157 Mass. 510, 513.

All that was necessary to give was given of the request touching the ignorance of the grand jury of the names of the persons described in the indictment as unknown. See *Commonwealth* v. *Coy*, 157 Mass. 200, 215. The court properly left the weight of the testimony of fellow conspirators to the jury. *Commonwealth* v. *Wilson*, 152 Mass. 12, 14. *Commonwealth* v. *Bishop*, 165 Mass. 148, 150. It does not appear to us to need argument that there was sufficient evidence of the guilt of the defendant Rogers. The preliminary meetings were in his house, he was present, and agreed to contribute money toward the end, and he helped at the time of the caucus.

We have not neglected the consideration of any part of the defendants' argument, but we think the mention of other points and further discussion superfluous.

Exceptions overruled.

P. J. Doherty & A. E. Burr, for Rogers.

F. W. Kittredge, for Lord.

J. F. Sweeney, F. B. Livingstone & G. A. Flynn, for Winsloe.

S. J. Elder, W. C. Wait & E. A. Whitman, for Newmarch.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

MARQUIS F. DICKINSON *vs.* INHABITANTS OF BROOKLINE.

Norfolk. March 5, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Tax, Domicil.

One who lets his house in the town of his domicil for several successive years and establishes himself with his family in what appears to be a permanent residence in another town, and intends to go on living in the same way, cannot retain his former domicil merely by desiring to do so and continuing to vote there, without any actual intention of living there again.

CONTRACT for taxes for the year 1899, paid under protest on the ground that the plaintiff was not an inhabitant of Brookline on May 1 of that year. Writ dated April 21, 1900.

In the Superior Court *Stevens*, J. refused to order a verdict for the plaintiff and submitted the case to the jury, who returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. B. Farr, for the plaintiff.

C. A. Williams, for the defendant, submitted a brief.

HOLMES, C. J. This case comes here upon exceptions to a refusal to direct a verdict for the plaintiff. The technical answer to such a request is obvious, that the jury may not believe the plaintiff's testimony. But in this case the testimony, which came wholly from the plaintiff himself, was so perfectly candid that the counsel for the defendant very properly did not rely upon a merely technical answer but argued that the plaintiff's statement at least was consistent with the verdict for the defendant, and that the refusal of the ruling was right on that ground.

It is an action to recover taxes paid under protest, on the ground that the plaintiff was not an inhabitant of Brookline on May 1, 1899, the date of the assessment. The facts are simple. The plaintiff was domiciled in Boston. In or before April, 1890, he probably changed his domicil to Cohasset, and for some years spent four or five summer months in the former place and the rest of the year in Brookline. Since 1895, or 1896, he has let

his Cohasset house and has permanently inhabited only the Brookline house, which seems to be the more important structure of the two, and stands in the name of the plaintiff's wife. He has continued to vote in Cohasset, and has intended, so far as consistent with the facts, to remain an inhabitant of Cohasset.

Of course the argument for the plaintiff is that his domicil is presumed to continue until it is proved to have been changed, that it could be changed only by his intent and overt act, and that he expressly denied the intent. The ambiguity is in the last proposition. The plaintiff did not deny that he intended to keep on living as he had lived for the last few years, and if the jury saw fit to find, as no doubt they did, that he did intend to do so, then he did intend the facts necessary to constitute a change of domicil, and what he did not intend was simply that those facts should have their inevitable legal consequence. If a person is present with his family in a house in Brookline and intends to make his actual headquarters there for the rest of his life, and to live no more in the place of his former domicil, he cannot retain the old domicil by the simple means of intending, subject to his actual change, to retain advantages inconsistent with it. The proposition hardly needs illustration. When you intend the facts to which the law attaches a consequence, you must abide the consequence whether you intend it or not. Of course, if hereafter, upon the recurrence of this question, Mr. Dickinson is prepared to state that he never has given up his expectation of actually living in Cohasset, while that testimony would not take away the town's right to go to the jury, it may lead to a different result.

Exceptions overruled.

ANNA JEAN *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. March 5, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Negligence, Contributory of employee.

One of a yard gang of a railroad company is not in the exercise of due care, if after jumping from the cab of a switching engine he steps or walks upon a parallel track six feet away, without looking to see whether a train is coming, and is struck by a freight train moving from seven to nine miles an hour, and his failure to look in the direction of the approaching train is not excused if the bell of the engine striking him was not rung.

TORT under St. 1887, c. 270, §§ 1, 2, for causing the death of the plaintiff's husband, one of a yard gang in the defendant's freight yard at Lowell. Writ dated July 19, 1901.

In the Superior Court *Gaskill*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. H. Bent, for the plaintiff.

F. N. Wier, for the defendant.

BARKER, J. We are of opinion that there was no evidence from which it could be found that the plaintiff's husband was killed while in the exercise of due care. It might be found from the evidence that the bell of the engine which struck him was not rung. But the engine was drawing a freight train the speed of which was from seven to nine miles an hour. This train was going in the same direction as the switching engine and cab from which the deceased jumped to the ground and upon a track parallel with that on which was the switching engine. The two tracks were about six feet apart and the deceased jumped from the cab to the space between the two tracks, and then walked on to the track on which the freight train was approaching. Both these tracks were substantially straight at the place of the accident and for some six hundred feet in the direction from which the freight train was approaching. The track on to which the deceased walked was the outward bound track and trains in the regular course passed over it in the same direction in which the switching engine was

passing when the deceased jumped off. As he jumped off and walked upon the outward bound track he was not looking in the direction from which the freight train was coming but in the opposite direction. The engineer of the switching engine saw the danger of the deceased and called to him to look out. We assume in favor of the plaintiff that the deceased did not know when he jumped from the cab that the freight train was actually so near as to endanger him, or that it was so near that its approach had been seen or heard by others upon the cab, and that the work which he had to do made it right for him to leave the cab at the place where he jumped from it. But he must be held to have known that trains might at any time come upon the outward bound track from the direction from which the train which ran over him did come. His duty did not require him to walk upon that track. He might have remained in the space between the tracks or have gone upon the inward track after the passing of the cab. Whether he went at once upon the outward bound track after jumping and was at once run over by the freight train, or whether he walked upon that track until struck by a train which was in full view from where he was while it was passing some six hundred feet he could not be found to have been in the exercise of due care. He either stepped upon the track directly in front of the engine or walked upon the track without perceiving the train while it was approaching him from behind for a distance of several hundred feet. It was his duty to look out for himself while on the tracks, and even if the engine bell was not rung the noise of the train must have been enough to give him warning of its approach if he had been in the exercise of due care. The burden was upon the plaintiff to show due care by evidence from which it could be inferred reasonably, and for lack of such evidence it could not be inferred reasonably simply because the engine bell was not rung.

Exceptions overruled.

BOSTON PENNY SAVINGS BANK *vs.* MOSES B. L. BRADFORD.

Middlesex. March 5, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Assignment, For the benefit of creditors. *Bills and Notes. Surety. De minimis.*

Where the maker of a promissory note has made a voluntary assignment for the benefit of creditors, and the holder of the note on receipt of dividends amounting to sixty-seven per cent of his claim gives the trustee a release of all demands against him, this does not release the maker from his liability for the unpaid balance of the note, and the liability of a surety on the note is diminished only so far as he may have suffered loss by the release.

In an action against a surety on a note, the judge directed a verdict for the plaintiff for the full amount claimed, whereas, to have been strictly accurate, he should have left to the jury the question, whether the defendant had been prejudiced, and if so how much, by a release given by the plaintiff to an assignee for the benefit of creditors of the maker of the note on receipt of a part of his claim. But it appeared, that the only possible loss to the defendant from this cause was such proportional part of twelve or fifteen dollars as the plaintiff's claim of about $8,000 bore to the whole fund of $1,660,000 which had been received and disbursed by the trustee, and it did not appear that the attention of the judge had been directed to this possibility of loss. *Held*, that the defendant's loss, if any, from the error was too trifling to be of consequence and an exception to the ordering of the verdict was overruled.

CONTRACT against a surety for the balance due on a promissory note of the Assabet Manufacturing Company, originally for $25,000. Writ dated January 2, 1900.

At the trial in the Superior Court *Aiken*, J. directed a verdict for the plaintiff in the sum of $8,145.21, apparently the full amount claimed; and the defendant alleged exceptions.

The instrument of release, relied upon by the defendant in the manner stated by the court, was as follows:

"I hereby acknowledge that I have received from Edward N. Fenno, Arthur B. Silsbee and Jeremiah Williams, assignees of the Assabet Manufacturing Company, a third dividend, being twelve per cent of the amount of my claim, as presented to the said assignees, to wit: $3,032.08, and in consideration thereof I hereby release the said assignees, and each of them, and the estate of the Assabet Manufacturing Company in their hands, from all claims and demands which I have against them or either of them.

"Witness my hand and seal: Provided that this release shall not affect in any way the claim of the Boston Penny Savings Bank against the directors or shareholders of the Assabet Mfg. Co., and that if it shall have such effect it shall be void. Boston Penny Savings Bank, by its Treasurer, Wm. H. Durkee." (Corporate seal.)

F. L. Norton, for the defendant.

P. Keyes, for the plaintiff.

KNOWLTON, J. The defendant signed the note in suit as a surety, and his defence is that he has been discharged from liability by the plaintiff's execution of an instrument under seal running to the assignees of the Assabet Manufacturing Company, the principal on the note, releasing them from all claims and demands against them or either of them. The assignees held under a voluntary assignment of this corporation for the benefit of creditors, and this release was made and delivered for the payment to the plaintiff of three dividends, amounting in all to sixty-seven per cent of the note, and the payment of like dividends to other creditors who were parties to the assignment, the whole amount received and disbursed by the assignees in the execution of their trust being $1,660,000.

It is not contended that the defendant was discharged from liability by the plaintiff's becoming a party to the assignment, for the sixteenth article of the assignment expressly saves all rights of creditors to any security held by them, and also their rights against sureties. The defendant treats the release of the trustees as if it were a release of the corporation that made the assignment; but it does not affect the liability of the corporation for the unpaid balance of the note. It purports only to release the assignees from liability on account of the property that came into their hands. It is not like the release of a principal, which, if made without reservation, releases the surety also. It is merely an acknowledgment of satisfaction as to certain property held by the trustees for the security of the plaintiff. It cut off the right of the plaintiff and also of the surety afterward to resort to any part of that property. If the defendant was prejudiced by the plaintiff's giving up of the security which should have been held for the payment of the balance of the note, his liability is diminished to the extent of the loss from the release

of the property, but it is not affected beyond that. *Baker* v. *Briggs*, 8 Pick. 122. *American Bank* v. *Baker*, 4 Met. 164, 177. *Guild* v. *Butler*, 127 Mass. 386. This rule of law disposes of the defendant's requests for rulings, which were all founded on a different view of the decisions.

The only remaining question is whether the defendant can take anything by his exception to the ruling given. The judge directed the jury to return a verdict for the plaintiff. This we understand to have been for the full amount remaining unpaid. There was evidence that at the time of making the last dividend the trustees "retained in their hands about two thousand dollars to cover such legal and incidental expenses as might come in closing the accounts." There was nothing to indicate that this sum was more than was reasonably necessary for that purpose. It also appeared that they then had in their hands some old claims which they considered of no value, and that they subsequently received on account of one of these twelve or fifteen dollars. Beyond this sum it does not appear that there was any valuable property or assets in their hands which was applicable to the claims of creditors. The plaintiff might have been entitled to such proportional part of this sum of twelve or fifteen dollars as its debt was of the whole indebtedness of about $1,600,000. To say nothing of the impracticability of making a new dividend for such a small sum, the plaintiff's share would be insignificant. To have been strictly accurate, the judge should have left to the jury the question whether the defendant was prejudiced, and if so how much, by the plaintiff's release of its interest in this property; but it is obvious that the attention of the judge was not directed to any such subject, and that the defendant's loss, if any, from the error, is too trifling to be of consequence. We are of opinion that the entry should be,

Exceptions overruled.

JOHN F. CRONIN *vs.* FITCHBURG AND LEOMINSTER STREET RAILWAY COMPANY.

Suffolk. March 6, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Evidence, Expert.

An expert may be examined as to statements made to him by a plaintiff in regard to his sufferings caused by the injury for which he sues, as being the grounds and reasons on which the expert formed his opinion, although otherwise the evidence would be excluded as hearsay and as self serving statements made by a party to a suit.

TORT for injuries alleged to have been caused by a collision of an electric car of the defendant with a wagon in which the plaintiff was driving, on September 27, 1898. Writ dated June 12, 1899.

At the trial in the Superior Court before *Bond*, J., Dr. Frank C. Richardson of Boston was called as a witness by the plaintiff and qualified as an expert who had made a specialty of nervous diseases. He testified in regard to an examination of the plaintiff made by him on May 18, 1901, as follows: "I obtained from him his statement of his sufferings at the time of his accident." Against the objection of the defendant, he further testified in regard to that examination as follows: "He complained of suffering considerable pain in the right leg, of backache on slight exertion, severe pain in the left side of the head, muscular weakness; that he tired easily; that his sleep was restless and troubled; that he could not sleep more than two hours at a time during a night; that he was nervous, excitable, emotional, easily startled; that he could not concentrate his mind on anything for more than a few minutes; that he had periods of tremor of the whole body, muscular twitchings and mild hysterical attacks."

The witness further testified in regard to an examination made by him upon October 28, 1901, as follows, the defendant objecting: "I examined him at my office in the presence of Dr. Goray last evening; he stated that he could see no change in his suffering from last spring; that he still had pain in his head,

pain in his leg; that the pain in his leg had largely given way to numbness; that he had not attempted to work because even ordinary exertion, as in work about the house, tires him; that his sleep is restless and troubled; that he cannot concentrate his mind any better than last spring; that he still has attacks of trembling and muscular twitching."

The foregoing evidence was given in direct examination, and to the admission of all of it the defendant excepted. The witness afterwards gave his opinion as to the physical condition of the plaintiff.

On cross-examination the witness testified in part that he had made two, and only two, examinations of the plaintiff; that both of these examinations were made at the request of the plaintiff's counsel, for the purpose of testifying for the plaintiff in this case; that the only other time when the plaintiff came under his professional observation was when the witness was present in May, 1901, in the court house, when Dr. Thompson made an examination for the defendant, while the first trial was in progress; that the witness had never been the physician of the plaintiff, and had never prescribed for him in any way, nor given him professional advice, nor had been asked to do so.

It appeared from the docket record, that the first trial of this case in the Superior Court was on May 20, 1901, and the second trial on October 28, 1901.

The jury returned a verdict for the plaintiff in the sum of $6,733; and the defendant alleged exceptions.

C. F. Barker, W. P. Hall & W. Wells, for the defendant.

J. E. Cotter, for the plaintiff.

BARKER, J. It is plain that the statement by a party to a cause of his bodily and nervous symptoms made long after the occurrence of the accident to which he attributes them and for purposes connected with the preparation for trial of a suit in which his condition of health is material, and not made to a physician for the purpose of obtaining advice or treatment are not admissible in evidence in his own favor as proof of the truth of the matters stated.

It is equally plain that every person admitted as an expert to testify to his opinion may state in his testimony the grounds and reasons for that opinion, and that the party calling the expert

may put in evidence those grounds and reasons in the direct examination of the expert, and before calling upon him to give his opinion to the jury.

The statement of these rules as to the examination of witnesses called as experts, made by Chief Justice Bigelow in *Barber* v. *Merriam*, 11 Allen, 322, 324, has since the decision of that case been considered as law in this Commonwealth and has governed trials. So well established is this doctrine that the expert, upon direct examination and before giving his opinion in evidence, may testify to the matters which form the grounds and reasons of that opinion that in *Koplan* v. *Boston Gas Light Co.* 177 Mass. 15, 21, this court overruled without discussion an exception to testimony so given and which save as showing the grounds of the opinion about to be given by the witness would have been inadmissible.

In the present case there is no doubt that the statements of the plaintiff were hearsay, and of that particularly dangerous and objectionable type, declarations of an interested party, made after suit brought and for the very purpose of preparing evidence to be used in his own favor at the trial. But no such rule applies to them as that which excludes private conversations between husband and wife, or communications between attorney and client. They may be admitted in evidence if offered by the adverse party either as admissions, or as contradictions of the testimony of the person who makes them. It follows that they may be admitted as the grounds and reasons of an opinion given in evidence or to be so given by an expert.

Being admissible for that purpose the exception to their admission was not well taken.

Exceptions overruled.

CITY OF BOSTON *vs.* UNION FREIGHT RAILROAD COMPANY.

Suffolk. March 10, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Union Freight Railroad Company. Street Railway, Duty as to repairing streets.

Since October 1, 1898, when St. 1898, c. 578, took effect, repealing Pub. Sts. c. 113, § 32, with the exceptions provided for in § 28 of the first named act, the Union Freight Railroad Company has been under no obligation to keep in repair any part of the streets through which its tracks are laid.

CONTRACT for $21,780.04 expended by the city of Boston in the years 1900 and 1901 in repairing the portions of Atlantic Avenue and Commercial Street occupied by the tracks of the defendant. Writ dated October 23, 1901.

In the Superior Court the case was heard on agreed facts by *Stevens*, J., who found for the defendant, and, at the request of the plaintiff with the consent of the defendant, reported the case for the consideration of this court.

If this finding was right, judgment was to be entered thereon; otherwise, judgment was to be entered for the plaintiff for the full amount claimed, with interest from the date of the writ, or for such other sum as this court might find it to be entitled to.

T. M. Babson, for the plaintiff.

C. F. Choate, Jr., for the defendant.

BARKER, J. The defendant received its charter by a special act of the Legislature passed on May 6, 1872, after the enactment of the general law authorizing the formation of steam railroads without special legislative authority, and two years before the enactment of the general law authorizing the formation of street railway corporations in a similar way. St. 1872, c. 53. St. 1872, c. 342. St. 1874, c. 29. Its charter was granted because of the failure of the Marginal Freight Railway Company to meet the expectations of the public, and contained provisions repealing the charter of the former company and looking to the taking of its tracks by the defendant. St. 1872, c. 342, §§ 6, 7. Leg. Doc. 1872, House, No. 219. The Marginal Company had been chartered by St. 1867, c. 170, and its rights were also affected

by the provisions of St. 1869, c. 461, § 5. Its charter provided that it should have all the privileges and be "subject to all the duties, restrictions and liabilities set forth in the general laws which now are or may hereafter be in force relating to street railway corporations so far as they may be applicable." St. 1867, c. 170, § 1. The charter also had this provision: "Said Marginal Freight Railway Company shall keep in repair, to the satisfaction of the superintendent of streets of the city of Boston, all the paving between the curb-stones of the streets in which their tracks shall be laid." St. 1867, c. 170, § 10. By still another section of the charter the Commercial Freight Railway Company, incorporated by St. 1866, c. 267, with the privileges and subject to the duties of street railways, was authorized to consolidate with and become one corporation with the Marginal Freight Railway Company. St. 1867, c. 170, §§ 6–16. The history of the legislation shows that it was the purpose of the St. 1872, c. 342, that the defendant should have somewhat similar powers and duties with those of the corporation whose charter the statute repealed. See Leg. Doc. 1872, House, No. 219; *Thornton* v. *Marginal Freight Railway*, 123 Mass. 32.

The year before the passage of the defendant's charter the Legislature, by St. 1871, c. 381, had again revised the general laws relating to street railways and in 1872 the general provision as to the repair of streets by street railway corporations was this: "Every corporation, its lessees or assigns, shall keep in repair such portions of any paved streets, roads and bridges as are occupied by its tracks; and when such tracks occupy streets or roads that are not paved, it shall, in addition to the portion occupied by its tracks, keep in repair eighteen inches on each side thereof, to the satisfaction of the superintendent of streets," etc. St. 1871, c. 381, § 21. Between 1867 and 1872 the construction of Atlantic Avenue, in which the defendant's charter gave it the right to lay its tracks, had substituted a wide thoroughfare for the narrow and crooked streets in which the Marginal Company originally had authority to lay tracks, and which it also had authority to widen and straighten. St. 1867, c. 170, §§ 8, 9.

The only motive power which the defendant had the right to use without permission from some public board was horse power,

and this right it derived only from the provision of its charter subjecting it to the laws relating to street railway corporations, a phrase then a synonym with horse railways. In the charter of the Marginal Company the provision was that the cars should be drawn only by horse power, unless the use of other power should be sanctioned by the board of aldermen. St. 1867, c. 170, § 3. In the defendant's charter the provisions are the general one giving it the privileges of street railway corporations, and of other railroad corporations so far as applicable, and this special provision, that "The cars on said road may be drawn during the night by steam power, subject to the regulation of said board of aldermen." St. 1872, c. 342, § 2. This shows that the defendant's charter contemplated the use of the streets by it with horses as in the case of street railways usually.

To have imposed upon the defendant as upon its predecessor the duty of keeping in repair all the paving of the streets between the curbings may well have seemed to the Legislature the exaction of more than would be just. But as the construction and repair of the tracks must of necessity disturb the paving between the rails and near them, and as the defendant could use horse power alone if it should so choose, and could not use steam power except in the night, there were the same reasons to induce the Legislature to require the defendant to do something toward keeping the streets in repair as in the case of the ordinary horse railway. For these reasons we think that the provision of its charter subjecting it to the duties and liabilities set forth in the general laws relating to street railway corporations, made the defendant subject to the provisions of St. 1871, c. 381, § 21, then in force and requiring street railways to keep in repair certain portions of the streets in which they had their tracks. We see no reason why the same provision of the charter did not make the defendant subject to the duties with reference to the repair of streets by street railway companies imposed by St. 1881, c. 121, and by Pub. Sts. c. 113, § 32.

But the provisions of Pub. Sts. c. 113, § 32, have been repealed by St. 1898, c. 578, § 26, "subject to the exception contained in section twenty-eight" of the repealing act, and if the defendant's railway is not within the exception the defendant was no longer under obligation to keep in repair any portion of the streets

when the acts were done on which the plaintiff relies for its cause of action.

The question whether street railways should make a direct payment for their use of the streets to the municipalities in which their tracks are located was brought to the attention of the Legislature by His Excellency Governor Wolcott in January, 1897. Acts and Res. 1897, Gov. Address, p. 644. The result was the passage of St. 1898, c. 578, which provides that street railway companies shall pay certain new taxes the proceeds of which go to the municipalities in which the tracks are located. St. 1898, c. 578, §§ 2–9. The act requires also that the sums received by the municipalities from these taxes shall be applied toward the construction, repair and maintenance of the public ways and the removal of snow therefrom. St. 1898, c. 578, § 10. It also provides that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations." St. 1898, c. 578, § 11.

Shortly before the passage of this statute the Legislature had granted to the Boston Elevated Railway Company rights which it did not intend to change or affect by the provisions of St. 1898, c. 578. See St. 1894, c. 548; St. 1897, c. 500, §§ 10, 19, 21. The existence of this grant was the reason for the exception in the repealing section of St. 1898, c. 578. There is no ground for supposing that the exception was intended to have any other effect than to leave the Boston Elevated Railway Company during the term of twenty-five years from June 10, 1897, unaffected by the provisions of St. 1898, c. 578, or to have any effect except in connection with tracks owned or leased by that corporation. To hold that it was intended to keep the provisions of Pub. Sts. c. 113, § 32, in force as to the defendant would be to suppose that the Legislature made as to the defendant a distinction merely fanciful and with no rational foundation. While the language of § 28 with the intention which we give it might have been somewhat different, it is adequate to carry out that intention, and would not have been used if it had been the purpose to provide that all the streets in which the Elevated Railway had tracks, and all street railways in such

streets were to remain subject to the provisions of Pub. Sts. c. 113, § 32.

It has not been contended that the clause in § 11 of St. 1898, c. 578, following that relieving street railway companies from the requirement to keep a portion of the surface material in repair, and forming part of the same sentence, namely, "but they shall remain subject to all legal obligations imposed in original grants of locations" makes the defendant liable in this action. If the defendant had any original grant of a location within the meaning of the clause quoted it must have been the locations given it by the board of aldermen in 1872, in which no obligation was imposed with reference to the care of streets, or its grant of powers contained in the first section of its charter, and the only obligation with reference to the care of streets imposed in that grant is the obligation to obey the general laws in force from time to time "relating to street railroad corporations, and to other railroad corporations, so far as the same may be applicable."

We are of opinion that whatever obligation the defendant may have been under with reference to the city streets before the time when St. 1898, c. 578, took effect, it has been under no obligation since to keep any part of the streets in repair. It is not liable to the plaintiff for any part of the expense of the work of repairing or repaving streets done under proceedings not begun until the year 1900.

Judgment for the defendant on the finding.

CLARA A. CUSHING *vs.* FREDERICK J. CUSHING.

Essex. March 10, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Practice, Civil, Final decree. *Divorce,* Alimony *pendente lite.*

On a libel for divorce an order was made for alimony *pendente lite.* The Superior Court ordered the libel dismissed. Exceptions were taken by the libellant which were overruled by this court, and an entry was made in the Superior Court

"Exceptions overruled as per rescript." After this, the Superior Court on application of the libellant made an order directing execution to issue against the goods and estate of the libellee for alimony *pendente lite*. From this order the libellee appealed. *Held*, that the appeal was not well taken, as no final decree had been entered in the Superior Court and the case was still pending in that court when the order was made. The entry "Exceptions overruled as per rescript" was not a final decree. The question, whether the original order for the payment of alimony had been revoked by the subsequent proceedings, appeared not to have been raised in the court below and was held not to be open on the appeal.

LIBEL FOR DIVORCE, filed December 29, 1898, before the court at a previous stage in 180 Mass. 150.

H. F. Hurlburt & S. B. Darling, for the libellee.

W. H. Niles, for the libellant.

LORING, J. This is an appeal by the libellee from an order of the Superior Court directing execution to issue against his goods and estate for alimony *pendente lite* to be paid to the libellant.

The libel was filed in December, 1898. On January 6, 1900, an order was made directing the libellee to pay to the libellant $7 a week *pendente lite* from December 1, 1899. The libel came on for hearing in the Superior Court in October, 1900, and, on the fifth day of the following November, the court rendered a decision which was entered on the docket, "Libel dismissed." At this hearing exceptions were taken by the libellant which were heard in this court on November 7, 1901, and overruled on the twenty-seventh day of the same month. While these exceptions were pending in this court, the libellant, on November 11, 1901, filed a motion in the Superior Court reciting the order for the payment of alimony *pendente lite*, and setting forth that no payment had been made under that order since the thirty-first day of October, 1900, and praying "that an execution against the goods and estate of the said Frederick J. Cushing may issue for the sum of $382, which is the amount now due to your petitioner under and by virtue of said order, said libel being still pending." After this motion was filed, the following entry was made upon the docket of the Superior Court: "Exceptions overruled as per rescript." Later, namely, on December 6, 1901, the libellee pleaded to the motion for execution that the libel had been dismissed and that the Superior Court had no jurisdiction to issue an execution against the libellee. On January 15, 1902, the

Superior Court made the following order: "Execution to issue as prayed for." It is from this order that the libellee has taken the appeal now before us.

We are of opinion that the appeal is not well taken. The entry of "Libel dismissed," made on the docket of the Superior Court on November 5, 1901, could have no greater effect than a finding by that court in favor of the libellee. Exceptions had been taken at the trial, which were afterwards allowed and entered in this court; that prevented a final decree being entered in the Superior Court dismissing the libel. The exceptions taken to this court transferred to this court the questions of law raised by the exceptions, but the libel remained as a pending cause in the Superior Court. The entry of "Exceptions overruled as per rescript," on the docket of the Superior Court, is not a final decree disposing of the cause. After the fact has been noted on the docket of the Superior Court, that a rescript of the court has been received, a final decree must be entered in the Superior Court, before the case is finally disposed of.

It follows that on January 15, 1902, when the Superior Court directed "execution to issue as prayed for," the case was pending in that court and it was within the power of that court to make such an order. The question argued by the libellee, whether the original order for the payment of alimony had been revoked by the subsequent proceedings, does not appear to have been raised in the court below and is not open on this appeal.

Order affirmed.

RISING SUN STREET LIGHTING COMPANY *vs.* CITY OF BOSTON.

Suffolk. March 12, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Tax, Personal property leased for profit. *Corporation*, Foreign.

Lanterns belonging to a Maine corporation, used by it under a contract for lighting the streets of Boston with gas and naphtha and for cleaning, repairing and maintaining the street lanterns, are used in the business of the company and under its control and are not taxable as personal property "leased for profit," under St. 1889, c. 446, now incorporated in R. L. c. 12, § 23, cl. 2.

APPEAL, filed April 1, 1901, to the Superior Court under St. 1890, c. 127, by a Maine corporation from a decision of the assessors of the city of Boston refusing to abate a tax paid under protest by the appellant on certain lanterns belonging to it and used in lighting the streets of that city.

In the Superior Court the case was heard by *Fessenden*, J., who found for the appellant in the sum of $632.30 and ordered judgment to be entered against the city of Boston for that amount and costs. At the request of the parties the judge reported the case for the determination of this court. If on the evidence and law the judge was authorized to find for the appellant, the finding and judgment were to stand; otherwise, judgment was to be entered for the city.

St. 1889, c. 446, now incorporated in R. L. c. 12, § 23, cl. 2, is as follows: "All personal property within the Commonwealth leased for profit shall be assessed for taxation in the city or town where such property is situated on the first day of May to the owner or the person having possession of the same."

W. O. Childs, for the appellant.

A. L. Spring, for the appellee.

KNOWLTON, J. The appellant made contracts in writing with the city of Boston to light and extinguish and keep clean and in good condition and repair, all naphtha street lamps used by said city for lighting its streets and places, and to renew mantles as often as necessary to maintain a proper light therefrom, and also to have charge of the gas lanterns used for lighting the streets, and to place Welsbach boulevard lanterns on posts designated, and to furnish gas for all gas lanterns, and keep them burning the prescribed number of hours, to keep all the lanterns clean and in good repair and condition, and to do certain other things in the performance of these contracts for lighting the streets.

The only question argued by the city is whether the naphtha lamps and fire alarm lanterns owned by the appellant and used by it in the performance of these contracts, are "personal property . . . leased for profit" within the meaning of these words in the St. 1889, c. 446. R. L. c. 12, § 23, cl. 2.

We are of opinion that they are not. They were not leased to the city of Boston in any proper sense. They were used in the appellant's business, and were owned and controlled by it in

the performance of its contracts, and these contracts required that the articles should be kept in use for the benefit of the city, but the city did not hold them as a lessee. The contracts under which the appellant used them were, in their principal parts, contracts to render service, and the furnishing of gas and the furnishing and using of these lamps and other articles were only parts of an important general undertaking whose object was to secure for the inhabitants of the city of Boston well lighted streets. Without dealing further with the details of the contracts, we are of opinion that the ruling of the judge of the Superior Court was correct.

Judgment for the appellant.

JOHN G. BARRY *vs.* THOMAS J. BARRY, executor, & another.

Suffolk. March 14, 1902. — April 2, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Devise, Construction.

A testatrix at the date of her will owned a house and lot at 18 Oneida Street in Boston and no other real estate. At the time of her death she also owned another house and lot on another street. After disposing of all her personal property, the will provided "I give my real property to my son T. to be held by him in trust," and then contained provisions as to the use of the house at 18 Oneida Street and as to the disposition of the income to be derived from letting a part or the whole of it, followed by a provision for selling the house at 18 Oneida Street "which is the subject of the foregoing trust," when the youngest child of the testatrix should arrive at the age of twenty-one years, and distributing the proceeds. No other real estate was mentioned or referred to in the will. *Held*, that the trust included only the Oneida Street property, and that the after acquired real estate was not disposed of by the will and passed to the heirs at law of the testatrix.

PETITION, filed in the Probate Court for the County of Suffolk February 25, 1901, to determine the construction of the will of Hannah Barry as to whether certain real estate numbered 9 on West Cottage Street in that part of Boston called Roxbury owned by the testatrix at the time of her death was included in a trust created by the fourth article of her will.

In the Probate Court *Grant*, J. made a decree directing the

trustee to apply the terms of the trust only to the property at 18 Oneida Street in Boston named in the fourth article of the will, and declaring that the real estate on West Cottage Street and all real estate acquired after the time of the execution of the will and all the real estate of the deceased except the real estate numbered 18 Oneida Street was not disposed of by the will, but was intestate property and descended to the heirs at law of the deceased, and ordered that it should be dealt with accordingly. The petitioner appealed.

The case came on to be heard before *Morton*, J., who at the request of the parties reserved it upon the petition, answers, supplemental petition, answers filed in this court, decree of the Probate Court, objections to the decree, and the agreed statement of facts, for the consideration of the full court, such decree to be entered as equity and justice might require.

The will, omitting the introductory and attesting clauses, was as follows:

"First. I give all my household furniture including all books and pictures to my daughter Catherine Barry.

"Second. I give two hundred dollars to my son Thomas J. Barry to be held by him in trust and to be expended by him in purchasing a headstone to be by him on my decease placed over my grave.

"Third. All the rest of my personal property I give to my children Thomas J. Barry, Francis J. Barry, John G. Barry, James F. Barry, Michael W. Barry and Catherine Barry to be divided among them equally share & share alike.

"Fourth. I give my real property to my son Thomas J. Barry to be held by him in trust until my youngest child reaches the age of twenty-one (21) years. If my son Thomas J. Barry desires to live in my house numbered eighteen (18) Oneida Street with his brothers and sister keeping a home with them in said house then he is to pay no rent for the use of that part of said house that he and his brothers and sister may occupy, and if my son Thomas J. Barry lives in said house as hereinbefore stated then the rent and income he will receive from the remainder of the house after the payment of taxes and necessary expenses is to be used by him for the support and education of my son Michael W. Barry until he arrives at the age of eighteen (18) years,

and of my daughter Catherine Barry until she arrives at the age of twenty-one (21) years if she remains unmarried: If my said daughter Catherine Barry marries before she arrives at the age of twenty-one (21) years then she is not to receive any of said rent and income of said house after her marriage. The rent and income received from said property is to be divided and used in equal amounts for the support and education of my said children Michael W. Barry and Catherine Barry should my son Michael W. Barry die before he arrives at the age of eighteen (18) years leaving his sister Catherine Barry surviving him then said Catherine is to receive the entire amount of said rent and income until she arrives at the age of twenty-one (21) years or unless she marries as hereinbefore stated: should my said daughter Catherine marry or die before she arrives at the age of twenty-one (21) years my said son, Michael W. Barry surviving then the entire amount of said rent and income of said property is to be used by my said Trustee in the support and education of my said son Michael W. Barry until he arrives at the age of eighteen (18) years: should my son Thomas J. Barry upon my death give up keeping a home for his brothers and sister in my house numbered eighteen (18) Oneida Street and live elsewhere then I direct him as my said Trustee to use the rent and income of said house eighteen (18) Oneida Street after the payment of taxes and the necessary expenses is to be used by him for the support and education of my son Michael W. Barry until he arrives at the age of eighteen years (18), and of my daughter Catherine Barry until she arrives at the age of twenty-one (21) years if she remains unmarried: If my said daughter Catherine Barry marries before she arrives at the age of twenty-one (21) years then she is not to receive any of said rent and income of said house after her marriage: The rent and income received from said property is to be divided and used in equal amounts for the support and education of my said children Michael W. Barry and Catherine Barry, should my son Michael W. Barry die before he arrives at the age of eighteen (18) years leaving his sister Catherine Barry surviving him then said Catherine is to receive the entire amount of said rent and income until she arrives at the age of twenty-one (21) years or unless she marries as herein before stated: should my said daughter Catherine Barry marry or

die before she arrives at the age of twenty-one (21) years leaving my said son Michael W. Barry surviving then the entire amount of said rent and income of said property is to be used by my said Trustee in the support and education of my said son Michael W. Barry until he arrives at the age of eighteen (18) years. When my youngest child shall arrive at the age of twenty-one (21) years, I direct my said Trustee to sell said real property numbered eighteen (18) Oneida Street which is the subject of the foregoing trust and I direct him to divide the proceeds of said sale free from any trust as follows: I give the sum of One thousand ($1000.) to my son Thomas J. Barry, I give the sum of one thousand ($1000.) to my daughter Catherine Barry and the balance of the said proceeds if there be any remaining to be divided among my remaining children share and share alike: should my said real property numbered eighteen (18) Oneida Street at a sale as hereinbefore authorized by my Trustee bring the sum of two thousand ($2000.) dollars or less then I direct my said Trustee to divide the money received from such sale of said property of two thousand ($2000.) or less equally between my son Thomas J. Barry and my daughter Catherine Barry share and share alike.

"Fifth. I nominate and appoint my son Thomas J. Barry to be the guardian of my three youngest children James F. Barry, Michael W. Barry, and Catherine Barry.

"Sixth. I nominate and appoint my said son Thomas J. Barry to be the Executor hereof and I request that he be exempt from furnishing a surety or sureties on his official bond as such Executor, Trustee and Guardian."

M. L. Jennings & S. A. Jennings, for the petitioner.

M. J. Creed & J. P. Crosby, for the respondents.

HAMMOND, J. This is a very plain case. It is unnecessary to recite in detail the language of the will. It is clear that the provisions of the trust created in the fourth clause are applicable only to the Oneida Street estate. In one part of the clause this estate is expressly designated as "the subject of the foregoing trust." The real estate subsequently acquired by the testatrix formed no part of the trust estate.

Decree affirmed.

ELISA GUNTHER *vs.* OTTO GUNTHER.

Suffolk. March 18, 1902. — April 2, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Contract, Consideration. *Practice, Civil. Discretion of Court.*

A contract that, if the plaintiff, a widow, would deliver to the defendant, her father in law, the clothes, watch and other property of her late husband and would assent to the appointment of the defendant as administrator of his estate, the defendant would pay the plaintiff $1,000, when it has been wholly performed on the part of the plaintiff, furnishes a good consideration for the defendant's promise.

The refusal of a request for a ruling which singles out only one or two circumstances from many bearing upon the question involved is within the discretion of the presiding judge.

CONTRACT by the widow of Julius A. Gunther against the father of her late husband on an alleged oral agreement to pay the plaintiff $1,000. Writ dated November 8, 1900.

In the Superior Court *Richardson*, J. refused to rule that the plaintiff could not recover and also refused other rulings requested by the defendant which are referred to by the court.

The jury returned a verdict for the plaintiff in the sum of $1,028.50; and the defendant alleged exceptions.

M. L. Jennings, S. A. Jennings & G. A. Flynn, for the defendant.

T. F. Meehan, for the plaintiff.

HAMMOND, J. The contention of the plaintiff is that in consideration that she would deliver to the defendant the goods and effects of the estate of her late husband, namely, his clothes, watch and other property, and would assent to the appointment of the defendant as the administrator of the estate the defendant agreed to pay her $1,000; and that she has fully performed her part of the contract.

The evidence in support of this contention is not very strong, and a verdict for the defendant might reasonably have been expected. It was strong enough, however, to present a case for the jury, and we cannot say, as matter of law, that they were not warranted in finding that the contract was made, that the

plaintiff had fully performed her part of it, and that she had never repudiated it.

The defendant urges that inasmuch as the property did not belong to the plaintiff there was no consideration for the defendant's promise. The property, however, belonged to the estate of her deceased husband. There is no evidence that the debts, if any, were sufficient to exhaust it, and in any event the Probate Court, upon her application, could and probably would have granted an allowance to her as the widow, and the sum so allowed could not have been reached by creditors of the estate. Whether there were creditors or not, she had substantial rights in or to the property, and her surrender of them was a sufficient consideration. For the same reason the court was right in refusing to give the third and sixth rulings requested by the defendant. Inasmuch as the fourth request singled out only one or two circumstances from many bearing upon the question involved, it was entirely within the discretion of the court whether or not it should be given.

For the same reason the judge rightly refused to rule that the return of the bank book to the plaintiff and her acceptance of the same was a repudiation of the contract. No error appears in the manner in which the judge dealt with these requests. The fifth request was given in substance.

Exceptions overruled.

JONATHAN B. DIXON *vs.* ANNIE E. SMITH, executrix.

Suffolk. March 20, 1902. — April 2, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Exceptions. *Landlord and Tenant,* Tenant at Sufferance. *Deed,* Registration.

The admission of immaterial evidence which does the excepting party no harm will not sustain an exception.

A tenant at sufferance made such by a conveyance of which he had no notice or knowledge is not liable in an action for rent under Pub. Sts. c. 121, §§ 8, 6, 8.

The recording of a deed is not constructive notice to one having an antecedent interest in the land conveyed.

CONTRACT for use and occupation of a certain dwelling house in Medford. Writ in the Municipal Court of the City of Boston dated March 27, 1899.

On appeal to the Superior Court the case was tried before *Hardy*, J., without a jury. The judge refused certain rulings requested by the plaintiff and found for the defendant; and the plaintiff alleged exceptions.

J. B. Dixon, pro se.

W. F. Kimball, for the defendant, submitted a brief.

BARKER, J. The plaintiff on October 1, 1897, took a deed from one Martin of lands which included a house and lot then occupied by the defendant's testator, under an arrangement with Martin by which the testator was to have the house and lot for a term ending June 30, 1898. The deed to the plaintiff contained a clause to the effect that the house and lot mentioned were conveyed subject to a lease to the testator for a term ending June 30, 1898, and that the lease remained the property of Martin. The testator died on January 20, 1898, and there was evidence that he had paid rent to Martin to the first day of February following. The plaintiff gave no notice of his purchase of the property until after the death of the testator. A lease from Martin to the testator for the term ending June 30, 1898, was in fact drawn up and executed by Martin, but it was never signed by or delivered to the testator who had no notice or knowledge of it, and it remained after execution in the possession of Martin, and at the time of the trial had been lost.

On March 27, 1899, the plaintiff brought this suit against the defendant as executrix for use and occupation of the house for the seven months from October 1, 1897, to May 1, 1898.

The trial in the Superior Court was without a jury and after a finding for the defendant the case comes here upon the plaintiff's exceptions.

The first exception is to the admission in evidence of the contents of the undelivered lease. Assuming in favor of the plaintiff that the evidence was inadmissible, the bill of exceptions shows that upon the rest of the evidence with or without this the defendant was entitled to judgment. Therefore the introduction of the evidence of the contents of the lease did the plaintiff no harm and this exception must be overruled, because

upon a point wholly immaterial to the finding, and not shown by the bill to have injured the excepting party. *Commonwealth* v. *Bailey*, 11 Cush. 415. *Burghardt* v. *Van Deusen*, 4 Allen, 374, 377. *Bragg* v. *Boston & Worcester Railroad*, 9 Allen, 54. *Wing* v. *Chesterfield*, 116 Mass. 353. *Warner* v. *Jones*, 140 Mass. 216. *Worcester Coal Co.* v. *Utley*, 167 Mass. 558, 560.

The second exception was to the refusal to rule that the testator's tenancy at will was converted by the deed to the plaintiff into a tenancy at sufferance and that the tenant at sufferance became liable to the plaintiff for such time as he or his executrix continued to occupy or detain the house or any part of it.

The language of Pub. Sts. c. 121, §§ 3, 6, 8, does not purport to give an action for any rent except such as accrued in the lifetime of the tenant at sufferance, and therefore the request could not be given in terms. Upon the undisputed evidence the plaintiff had given no notice of his ownership of the house until after the death of the defendant's testator, who was not shown ever to have had knowledge of the transfer of title. It has long been held to be "a rule, founded on the plainest principles of equity and fair dealing, that where a right of action depends on a fact peculiarly within the knowledge of the plaintiff, and which the other party may not be presumed to know, and does not in fact know, the plaintiff must give the defendant notice of such fact." *Furlong* v. *Leary*, 8 Cush. 409, 410. The provisions of Pub. Sts. c. 121, making tenants at sufferance liable for rent, like those of Pub. Sts. c. 175, giving a summary process for the recovery of land are to be construed with this rule. It has often been applied to proceedings under Pub. Sts. c. 175 and under corresponding provisions of earlier statutes. *Furlong* v. *Leary*, *ubi supra*. *McFarland* v. *Chase*, 7 Gray, 462, 463. *Mizner* v. *Munroe*, 10 Gray, 290. *Pratt* v. *Farrar*, 10 Allen, 519, 520. *Lawton* v. *Savage*, 136 Mass. 111, 115. As was said in *Farley* v. *Thompson*, 15 Mass. 18, 26, "If the assignee of a reversion will lie by, and suffer the lessee to pay rent to the lessor as it falls due, he has no ground for complaint, although he may suffer by his neglect."

In all the cases cited by the plaintiff in which a tenant at will who has become a tenant at sufferance by a conveyance of the property has been held liable for rent under the provisions of

Pub. Sts. c. 121, the tenant was shown to have had notice of the transfer. See *Bunton* v. *Richardson*, 10 Allen, 260; *Merrill* v. *Bullock*, 105 Mass. 486; *Lucier* v. *Marsales*, 133 Mass. 454; *Cofran* v. *Shepard*, 148 Mass. 582. In *Emmes* v. *Feeley*, 132 Mass. 346, the tenant had notice of the change of title by the taking before the date from which he was held to pay. We are therefore of opinion that a tenant at sufferance made such by a conveyance of which he has no notice or knowledge is not liable to an action for rent under the provisions of Pub. Sts. c. 121, §§ 3, 6, 8, and that in the state of the evidence the first ruling requested was rightly refused.

The remaining exception is as to the effect of the undelivered lease and of the clause in the plaintiff's deed referring thereto. We assume without so deciding that the terms of the request were correct in law. Upon the uncontradicted evidence the whole matter was immaterial and the request was for that reason rightly refused.

It was suggested by the plaintiff at the argument that the defendant's testator was to be charged with notice of the deed from Martin to the plaintiff because that deed was recorded in accordance with the statutes relating to the registration of conveyances of land. But the defendant's testator was not bound to take notice of the record of a conveyance which was subsequent to the creation of the testator's interest in the land. *George* v. *Wood*, 9 Allen, 80. *Western Union Telegraph Co.* v. *Caldwell*, 141 Mass. 489, 493.

Exceptions overruled.

JAMES BENCE *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 21, 1901. — April 3, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Conflict of Laws. Jurisdiction. Negligence, Employers' liability, fellow servant, assumption of risk.

In an action of tort by a resident of Connecticut against a Connecticut corporation having a usual place of business in this Commonwealth for an injury sustained

in Connecticut, it was assumed, that the Massachusetts courts had jurisdiction and that the plaintiff was entitled to recover here if he could have done so in Connecticut.

In an action by a freight brakeman for the alleged negligence of the railroad company employing him in leaving a car on an intersecting track so near the junction that the plaintiff on the step of a passing car was struck by it, it appeared, that the injury occurred in Connecticut and that by the law of Connecticut one servant who exercises control over another is regarded not as a fellow servant but as a vice principal, and that there was such a person in charge of the yard where the plaintiff was injured, but there was no evidence to show who put the car that did the injury too near the junction or whether it was done by one who strictly was a fellow servant or by one in authority. *Held*, that on this evidence a verdict rightly was ordered for the defendant.

The danger from the permanent overcrowded condition of a railroad freight yard from its being inadequate for the business of the road is a risk which a freight brakeman working there assumes.

TORT by a freight brakeman employed by the defendant for injuries alleged to have been caused by the negligence of the defendant in placing and leaving a car on an intersecting track so near the junction with the track on which the plaintiff's car was moving that the plaintiff was knocked from the car and injured, with a second count, alleging that the defendant provided a freight yard insufficient in capacity and area and so laid out as to be dangerous, and negligently allowed cars to stand too near the junction of intersecting tracks so as to make it dangerous for trains to pass, whereby the plaintiff was injured. Writ dated June 10, 1896.

In the Superior Court the case was tried before *Lilley*, J., who at the close of the evidence ruled that the action could not be maintained and ordered a verdict for the defendant. The plaintiff alleged exceptions, which after the resignation of *Lilley*, J., were allowed by *Fessenden*, J.

The case was argued at the bar in November, 1901, and afterwards was submitted on briefs to all the justices.

W. B. Sullivan, (*C. W. Ford* with him,) for the plaintiff.

C. F. Choate, Jr., for the defendant.

LATHROP, J. This is an action of tort by a person who is described in the writ as of New London in the State of Connecticut, against a Connecticut corporation, having a usual place of business in this Commonwealth, for an injury sustained by him in Connecticut. We assume for the purposes of the case that the court has jurisdiction, and that the plaintiff is entitled

to recover if he could have recovered in Connecticut. *Walsh* v. *New York & New England Railroad*, 160 Mass. 571. We further assume that the plaintiff was in the exercise of due care.

The accident occurred in the defendant's freight yard at New London, at four o'clock in the morning of November 6, 1895. In this yard were two main tracks, and east of them were three side tracks, numbered, respectively, five, six and seven. There were also four other side tracks. Tracks six and seven united at a switch and frog, and further along joined five, and then ran into one of the main tracks.

The plaintiff had been in the employ of the defendant for four years. During this time he had worked all around this yard and another one across the river. He was familiar with both yards, and was the most experienced man in the crew to which he belonged, except the conductor. For three years before the accident his work was at night. During the time he was at work in the yard, there had been no change in the position of the tracks, although for the last two years before the injury all of the tracks had been very crowded, and there had been two switching crews at work night and day.

The train on which the plaintiff was the rear man had backed down on track seven, to couple on to one or more cars. The conductor and the plaintiff were on the ground. The signal was given to start ahead. There was a ladder on the end of the last car, and grab handles on the side, and also a step. The conductor got on first. Then the plaintiff swung on to the step, and reached around and took hold of the ladder. While in this position, we assume, although this is not very clear on the evidence, that he was struck by a car which had been left standing on track six, too near the junction of the two tracks.

The first count of the plaintiff's declaration goes upon the ground that the defendant was negligent in so leaving the car on track six. At the trial the contention was that one Dunn, the yard master who had general charge of the yard, was the person thus guilty of negligence; and to take the case out of the rule of fellow servants, it was contended that in Connecticut a servant who had control and direction over other servants was regarded as a vice principal, for whose negligence the general employer would be responsible. To prove the Connecticut law

on this subject, the plaintiff put in evidence the cases of *Wilson* v. *Willimantic Linen Co.* 50 Conn. 433, *Darrigan* v. *New York & New England Railroad*, 52 Conn. 285, *McElligott* v. *Randolph*, 61 Conn. 157, *Gerrish* v. *New Haven Ice Co.* 63 Conn. 9, and the testimony of Mr. Waller, an attorney at law, practising in Connecticut. We do not think that Mr. Waller's testimony adds anything to what appeared in the cases put in evidence, for he testified: "I think that the law on this point is completely stated in those four cases. I think those four cases are the cases that constitute the Connecticut authority on this point." Nor do we deem it necessary to consider these cases at length. It is enough to say that they show that while the rule of fellow servants prevails in Connecticut, one who exercises control over another is not regarded as a fellow servant but as a vice principal.

The question remains whether there was negligence on the part of Dunn. An examination of the evidence fails to disclose any. There is no evidence in the case to show who put the car that did the injury so near the switch that the plaintiff could not pass in safety, nor how long it had remained there. Nor does it appear that it was not placed there by one who in Connecticut would be regarded as a fellow servant. The plaintiff testified that, while the crowded condition of the yards existed, he never saw any cars the way they were then. So that it was not a customary thing to place cars on a side track so near another track that they would do injury. The plaintiff further testified: "He had seen Dunn once or twice a week in the different yards, giving directions about where cars were to be moved. Of course they were moving cars every day, and making a great many moves every day, and there were a great many moves of cars that Dunn did not direct at all. A great deal of the time the switching gang would place cars as the conductor said, or as the men left them. What Mr. Dunn did was, if he wanted particular cars placed in particular places, he would say so, or if he wanted particular cars, he would say so. Other than these particular instances, the men would go about their work, doing it in the ordinary way they were accustomed to, pulling cars in and pushing them out, making up trains and moving cars about. In such a case as this, for instance, if the last car was cut off and

the plaintiff had ridden it down, he would have got some general direction from the conductor on what track it was going, and he would ride it down and leave it in such place as he thought proper. That was the way the work was ordinarily done."

On this evidence we do not see how any negligence can be imputed to Dunn, and the plaintiff has failed to sustain his proposition that the placing of the car on track six was the direct result of the exercise of authority, and was not the act of a fellow servant.

It is suggested that the case of *Dacey* v. *Old Colony Railroad*, 153 Mass. 112, governs this case. In that case it was said that from the testimony it might be inferred by the jury that the car which was left too near the junction of the two tracks, and which did the injury, was left there by some one in authority. In the case before us the evidence leaves it entirely uncertain whether the car was left too near the junction by one who was strictly a fellow servant or by one in authority.

The second count charges the defendant with negligently and carelessly furnishing and providing a freight yard insufficient and inadequate in capacity, in allowing cars to stand too near the junction of intersecting tracks, and in not warning the plaintiff of the danger from such proximity of cars.

Taking up the last two allegations first, there was no evidence that cars were allowed to stand too near the junction of intersecting tracks. The only evidence was that on this particular night a car was found so left. The plaintiff was an experienced man, and did not need to be told that if a car should be left too near the junction of the two tracks, and he should be on the outside of his car, he might be hurt. He knew this as well as any one.

The first allegation of this count remains to be considered. Mr. Waller testified that the law in Connecticut required the company to furnish a safe place for an employee to work; and that in this respect he understood the law to be general in other States. This view of the law finds support in remarks made in some of the cases put in evidence; but we do not understand what is said as laying down any rule of law peculiar to Connecticut. The same rule has been stated here. It would seem, however, that there is nothing in the evidence to warrant the

jury in finding that there was any peculiar danger in the permanent condition of the yard, or that the yard was laid out differently from other freight yards, with main tracks and side tracks. While the cars were crowded, there was room left near the junction. Thus Loomis, a witness for the plaintiff, testified that when he said that the tracks were "jam full all the time," he meant that they got them as full as they could possibly be; and he added: "They do that everywhere. They did in this yard just as they did everywhere else, and handled cars in the same way." We have already noticed the plaintiff's testimony to show that the crowding of cars on track six was exceptional that night.

If, however, we assume that there was some evidence of danger in the permanent condition of the yard, this condition had remained the same during all the time that the plaintiff worked there, and was known to him. If he chose to work there knowing the permanent condition to be dangerous, he assumed the risk. In *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482, it is said by Mr. Justice Gray: "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risk of that condition of things." This is the well settled law in this Commonwealth. *Coombs* v. *Fitchburg Railroad*, 156 Mass. 200, and cases cited. *Fisk* v. *Fitchburg Railroad*, 158 Mass. 238. *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554. *Thain* v. *Old Colony Railroad*, 161 Mass. 353. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287. *Austin* v. *Boston & Maine Railroad*, 164 Mass. 282. *Content* v. *New York, New Haven, & Hartford Railroad*, 165 Mass. 267. *Vining* v. *New York & New England Railroad*, 167 Mass. 539. *Bell* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 443. *Dacey* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 479. *Ryan* v. *New York, New Haven, & Hartford Railroad*, 169 Mass. 267. *Whelton* v. *West End Street Railway*, 172 Mass. 555.

We find nothing to the contrary in the Connecticut cases, and in the absence of evidence the common law of that State must be considered the same as ours.

This view of the case renders immaterial the offer of proof by the plaintiff, which was excluded, that the vice-president of the defendant said at a hearing before the railroad commissioners, three months after the accident, when he asked for a right to condemn land, that the freight yard was, and had been for a long time, inadequate for the business of the railroad, and that the yard was dangerous and had been in that condition for three years.

Exceptions overruled.

JAMES H. GRIFFITH *vs.* WALTER B. SAVARY.

Suffolk. January 15, 1902. — April 3, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Fishery. Oyster Bed. License.

A license under Pub. Sts. c. 91, § 97, "to plant, grow and dig oysters" on a specified area of flats, gives the licensee the exclusive use of the flats described in the license, and another who digs with his hands quahaugs from the included flats is liable to the licensee in a civil action.

TORT in the nature of trespass *quare clausum fregit* for entering the plaintiff's oyster bed in that part of Wareham called Bourne's Cove, licensed by the selectmen of Wareham under Pub. Sts. c. 91, § 97, and digging in the soil thereof and injuring the oysters growing thereon and removing quahaugs therefrom. Writ dated November 5, 1901.

In the Superior Court the case was heard upon agreed facts by *Mason*, C. J., who found for the plaintiff in the sum of $1 without costs. The defendant appealed.

The agreed facts were as follows: The plaintiff was licensed by the selectmen of Wareham to plant, grow and dig oysters upon the premises described in the declaration in a tidal estuary of Buzzard's Bay, which were used for the growing of oysters at the time of the defendant's entry thereon, but it was agreed that no injury except so far as necessarily connected with or incidental to the doing of the acts themselves was done to the oysters on the premises.

The defendant on or about August 31, 1901, while the license was in force, entered upon the licensed premises by rowing there in a boat and anchored his boat on and over the premises below low water mark for the purpose of fishing. He did not cross any upland belonging to the plaintiff. Upon arriving over the licensed premises, the defendant went overboard from his boat, and while wading around in the water over the premises took and removed therefrom a certain quantity of quahaugs. In such taking and removal the defendant used only his hands and other parts of his body, digging up the quahaugs with his fingers and depositing them in his rowboat. In so doing he did no unnecessary damage to the bottom or to anything on it, and it was agreed that if the acts themselves were justified there had been no damage to the plaintiff. The defendant knew that the plaintiff had forbidden the defendant and all others from entering on or walking over the flats for the purpose of catching quahaugs or for any other purpose. The entry was not by permission of the plaintiff or of any one in his behalf; but the defendant went on the premises as a matter of right under a claim that by law he was entitled to do exactly what he did do in pursuance of his public right of fishing. It was admitted that all town regulations as to the taking of shell fish were complied with by the defendant and that none of such town regulations purported to authorize going upon premises licensed for the planting, growing and digging of oysters.

M. C. Waterhouse, for the defendant.

C. F. Chamberlayne, for the plaintiff.

LATHROP, J. The plaintiff was duly licensed "to plant, grow and dig oysters" on the locus in question, under the Pub. Sts. c. 91, § 97. By § 99, this gave him the exclusive use of the flats described in the license for these purposes. *Commonwealth* v. *Manimon*, 136 Mass. 456. While the case just cited was an indictment under the Pub. Sts. c. 91, § 101, and while the defendant in this case may not have committed the specific offence pointed out in that section, and may not be subject to prosecution under the St. of 1885, c. 220, § 5, yet if he has infringed the rights of the plaintiff, he is liable to a civil action. *Keene* v. *Gifford*, 158 Mass. 120.

The question remains whether the rights of the plaintiff have

been interfered with. This depends upon the construction to be given to the language of § 99, "The person so licensed, his heirs and assigns, shall for the purposes aforesaid have the exclusive use of the flats," etc. We are of opinion that the words used were not intended to be a limitation upon the use of the flats, but that they grant an exclusive use and designate the purpose for which the flats are to be used. Any other construction would lead to endless disputes and difficulties.

It is a well known fact that quahaugs are found in the mud and oysters above it. If, therefore, any one has the right to get the quahaugs, he must disturb the oysters; and the contention of the defendant in this case is that, if he can do so in a manner not made criminal, he is within his right, and may damage the bottom and everything upon the same, if necessary to the exercise of this right. We cannot agree with his contention; and are of opinion that the Legislature clearly regarded oysters as more valuable than quahaugs, and intended that a licensee should have an exclusive right to the flats included within his license.

Judgment for the plaintiff.

HAROLD D. COREY & others *vs.* JOHN H. GRIFFIN.

Suffolk. January 16, 1902. — April 3, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Equity Jurisdiction. Wagering Contracts. Contract, Validity.

A bill in equity will not lie to restrain the prosecution of an action that is groundless and malicious, as in that case there is a perfect defence at law.

An instrument under seal stating that the obligor wishes to open an account with the obligee for the purchase and sale of stocks, bonds and other securities, and agreeing to save the obligee harmless from any loss or damage arising from the obligor having no intention of performing such contracts of sale by actual receipt or delivery of the securities or payment of the price, which is in substance an agreement not to sue under St. 1890, c. 437, is void as against public policy.

BILL IN EQUITY, filed August 20, 1901, to restrain the defendant from prosecuting against the plaintiffs an action at law under St. 1890, c. 437, for money paid as margins on wagering contracts.

The defendant demurred. The Superior Court sustained the demurrer and made a decree dismissing the bill; and the plaintiffs appealed.

The instrument under seal, mentioned by the court, on which the plaintiffs relied was as follows:

"Boston, February 6, 1901. Messrs. Corey, Milliken & Company, Bankers and Brokers, 53 State St., Boston. Gentlemen: I desire to carry an account with you for the purchase and sale of stocks, bonds and other securities and commodities. While I intend finally to execute all contracts by actual receipt or delivery of the securities or commodities, and payment of the price therefor, I may desire from time to time to have you carry them for me, temporarily, upon credit.

"I may also desire to make sales of securities or commodities purchased and carried for me without actual receipt and re-delivery of the same by me, and to repurchase securities and commodities which I have ordered sold without actual delivery and receipt by me. In order to protect you from the annoyance of litigation involving the burden of proving the existence of my intention at the time of the respective transactions, to perform my contract by actual receipt or delivery and payment of price, I beg to say that I, for myself, my heirs, executors or administrators, hereby agree and bind myself and them to protect you and to save you harmless from all claims and demands founded wholly or in part upon the fact that at the time of the transactions hereinabove described, and your employment in connection therewith, I had, or have, or may have hereafter, no intention to perform the same by actual receipt or delivery of the securities or commodities and payment of price, and I further bind myself, my heirs, executors or administrators, to indemnify you for any loss or damage incurred or suffered by you on account of the non-existence of such intention. In witness whereof I have hereunto set my hand and seal this 6th day of February, 1901. Yours very truly, John H. Griffin." (Seal.)

H. W. Ogden, for the plaintiffs.

R. S. Bartlett, for the defendant.

HAMMOND, J. Griffin, the defendant, brought an action at law against the present complainants under St. 1890, c. 437, to recover back a certain amount of money paid to them upon cor-

tracts for the purchase and sale of certain stocks and securities; and this action is still pending. This bill is filed to enjoin the defendant from the prosecution of that action upon the ground that prior to every one of the contracts upon which recovery is sought therein the defendant signed a certain paper, a copy of one of which is annexed to the bill. It is a sealed instrument in the form of a letter to the complainants, in which the defendant, after saying that he desires to open an account with them for the purchase and sale of stocks, bonds and other commodities, agrees that, in order to protect them "from the annoyance of litigation involving the burden of proving the existence of [his] intention at the time of the respective transactions to perform [his] contract by actual receipt or delivery and payment of the price," he will indemnify them and save them harmless "from all claims and demands founded wholly or in part upon the fact" that he had no such intention, and from "any loss or damage incurred or suffered by [them] on account of the non-existence of such intention."

St. 1890, c. 437, § 2, is as follows: "Whoever contracts to buy or sell upon credit or upon margin any securities or commodities, having at the time of contract no intention to perform the same by actual receipt or delivery of the securities or commodities, and payment of the price, or whoever employs another so to buy and sell on his behalf, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made or the value of anything delivered: provided, such other party or other person so employed had reasonable cause to believe that no intention to actually perform existed."

It will be noted that in an action at law under this statute it is necessary for the plaintiffs to show among other things that at the time of the contract they had no intention to perform the same by the actual receipt or delivery of the securities and payment of the price, and it is plain from the language of the agreement in question that it was drawn up in view of this statute, and for the purpose of preventing the defendant from setting up the non-existence of such an intention in any action thereunder. Since proof of the non-existence of such an intention is essential to the maintenance of such an action, it follows that, no matter

how grave or frequent may be the violations of the statute in the transactions covered by the agreement, the complainants are not liable if the agreement is to stand.

The constitutionality of the statute is upheld upon the ground that it is intended to suppress a well known species of gambling. *Crandell* v. *White*, 164 Mass. 54. *Wall* v. *Metropolitan Stock Exchange*, 168 Mass. 282, 284. It is intended to suppress that gambling by putting such restraint upon those who are tempted to indulge in it, or to assist others in indulging in it, as can arise from a liability to pay back money received in the business. In a pecuniary sense this liability is a hardship upon the gambler, and the intention is that it should be. It is a liability which he incurs by reason of the transaction and as a consequence thereof. The object is not to punish the winner nor to protect the loser as such, but simply to prevent this kind of gambling by subjecting the participants to a liability which, except for some great purpose of preventing injury to the public morals, would seem to be unfair and unjustifiable. Take away this liability and you take away the restraint. The sting of the statute is gone, and it becomes a dead letter. It is true that it has been held that inasmuch as the statute gives only a right of action to the person who contracts to buy or sell, and contains no other penalty, it is remedial and not penal, and that after such a right has accrued it may be released or discharged. *Wall* v. *Metropolitan Stock Exchange*, *ubi supra*.

But in the present case we are asked to go further. The agreement can be operative only where the statute has been violated, for only in such a case can loss or damage come to the complainants by reason of the fact that the defendant had no intention to perform his contract. We cannot pass upon the question whether or not there has been a violation. The declaration in the action at law is assumed by both parties to set out such a violation, and in the consideration of this case we take that to be the proper interpretation of it. If, as alleged in the bill, the action is malicious and groundless, then the defence is perfect and the proper place to try the questions involved is in that case. If, however, there has been a violation, then the complainants ask to be relieved from the consequences upon the ground that there was an agreement in advance in substance

that the plaintiffs would never bring an action. As stated above, such an agreement, to be valid, would nullify the statute. It would take away the only security it seeks in the interest of public morals to give against stock gambling. No discussion is necessary to show that it would be contrary to public policy to recognize a right of parties to avoid the consequences of the statute by setting up an agreement having such an effect. The complainants therefore are not entitled to the aid of a court in equity. *Wall* v. *Metropolitan Stock Exchange*, *ubi supra*, on page 284. *Bosler* v. *Rheem*, 72 Penn. St. 54. *Hermany* v. *Fidelity Mutual Life Association*, 151 Penn. St. 17. See also *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Fidelity Mutual Life Association* v. *Ficklin*, 74 Md. 172.

Bill dismissed.

WILLIAM O. WILEY *vs.* CITY OF BOSTON.

Suffolk. March 4, 5, 1902. — April 3, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Landlord and Tenant. Contract, Construction.

In July, 1896, the plaintiff's land and buildings had been taken by the Boston transit commissioners under St. 1894, c. 548, and had been paid for in full. Thereafter the plaintiff continued his occupation until January 13, 1897, when the commissioners passed and communicated to him the following vote: "Voted, That W. [the plaintiff] be notified to pay for the occupancy of the portion of Lockwood's Wharf in Charlestown one hundred dollars per month from August 1, 1896, to January 1, 1897, to be paid forthwith, and at the rate of one hundred dollars per month from January 1, 1897, as long as his occupancy of the premises is not disturbed, or until he vacates the premises, and at a proportionate rate if his occupancy is disturbed, either party to have the privilege of terminating this agreement on giving one month's notice in writing; and that if these terms are not accepted on or before January 16, 1897, he must vacate the premises forthwith or immediate possession will be taken." The plaintiff complied with the terms of payment named in the vote and continued to occupy the premises, paying rent up to October 1, 1897. On October 30 he was notified to vacate and on November 4 was ejected by one to whom the commissioners had given a lease for the purpose. The plaintiff sued the city for damages. *Held*, that the plaintiff could not recover; that the vote gave him no right of possession but only permission to occupy until disturbed, and that the provision as to terminating the agreement on giving one month's notice in writing related only to the arrangement as to the price to be paid.

CONTRACT and TORT, with a count in each, for the alleged wrongful ejection of the plaintiff from certain land and a wharf and buildings in that part of Boston called Charlestown, alleged to have been let to the plaintiff by the transit commissioners of the defendant, and for the destruction of the buildings by them before the plaintiff's alleged right of occupation expired. Writ dated February 15, 1899.

At the trial in the Superior Court before *Maynard*, J., it appeared, that in July, 1896, the transit commissioners under St. 1894, c. 548, took the land, wharf and buildings, then belonging to the plaintiff, for the purposes of a new bridge to Charlestown. In January, 1900, the plaintiff recovered judgment for $10,000 as damages for such taking.

After the taking and until shortly before January 13, 1897, the plaintiff remained in possession of the premises without interruption.

On January 13, 1897, the transit commissioners passed the following vote which was transmitted to the plaintiff:

"Voted, That W. O. Wiley be notified to pay for the occupancy of the portion of Lockwood's Wharf in Charlestown one hundred dollars per month from August 1, 1896, to January 1, 1897, to be paid forthwith, and at the rate of one hundred dollars per month from January 1, 1897, as long as his occupancy of the premises is not disturbed, or until he vacates the premises, and at a proportionate rate if his occupancy is disturbed, either party to have the privilege of terminating this agreement on giving one month's notice in writing; and that if these terms are not accepted on or before January 16, 1897, he must vacate the premises forthwith or immediate possession will be taken."

Upon receiving a copy of this vote the plaintiff forthwith paid $500 in accordance with its terms and paid $100 on or about the first day of every month up to and including October 1, 1897.

On October 22, 1897, the city of Boston by its transit commissioners made a contract with one O'Connell for the construction of an approach to the Charlestown bridge over the premises, whereby the contractor was to remove existing structures and the materials thereof were to become his property. On October 28 and 29 there were communications between O'Connell, the plaintiff and the commissioners. On October 30 the com-

missioners made a lease dated November 1 to O'Connell, who demanded possession from the last named day, and on November 4, after an unsuccessful attempt the day before, entered and took possession and tore down the buildings against the objection and protest of the plaintiff.

At the close of the evidence the judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

C. W. Bartlett & G. A. Blaney, for the plaintiff.

T. M. Babson, for the defendant.

LORING, J. We are of opinion that the plaintiff is wrong in his contention that under the vote of the transit commissioners dated January 13, 1897, he was entitled to thirty days' notice before his possession of the premises could be interfered with. The land in question and all "the buildings thereon standing" were taken by the Boston transit commissioners in July, 1896. This vested the title in the city of Boston, and the plaintiff's right of possession was ended. St. 1894, c. 548, § 31. *Imbescheid* v. *Old Colony Railroad*, 171 Mass. 209. Notwithstanding this the plaintiff remained in possession for over five months and until January 13 when the transit commissioners passed the following vote:

"Voted, That W. O. Wiley be notified to pay for the occupancy of the portion of Lockwood's Wharf in Charlestown one hundred dollars per month from August 1, 1896, to January 1, 1897, to be paid forthwith, and at the rate of one hundred dollars per month from January 1, 1897, as long as his occupancy of the premises is not disturbed, or until he vacates the premises, and at a proportionate rate if his occupancy is disturbed, either party to have the privilege of terminating this agreement on giving one month's notice in writing; and that if these terms are not accepted on or before January 16, 1897, he must vacate the premises forthwith or immediate possession will be taken."

This vote did not purport to give the plaintiff any right of possession; but to fix the sum which should be paid by him so long as his occupancy was not disturbed by the city of Boston or those acting under the title of the city. The right of the city or those acting under the title of the city to end the occupancy of the plaintiff was left undisturbed and was expressly recognized in the vote by the provision that the hundred dollars

should be paid "as long as his occupancy of the premises is not disturbed" and "at a proportionate rate if his occupancy is disturbed."

The thirty days' notice was to end this arrangement as to the price to be paid so long as the plaintiff's occupancy was not disturbed; but the occupancy could be disturbed at any time.

The plaintiff had no right of possession when he was put out on November 4 and therefore cannot maintain his action in tort. He paid only until October 31 and therefore nothing is due to him on which he could maintain an action of contract.

Exceptions overruled.

EDDY P. DUNBAR & another, executors, *vs.* JENNIE T. DUNBAR.

Plymouth. March 13, 1902. — April 3, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Devise and Legacy, Construction.

On an appeal from a decree as to the interpretation of a will and codicil, it appeared, that the original will, after various gifts to other persons, gave to the appellant an interest in certain real estate and $5,000 in money. After other gifts, the rest and residue of the estate was given to four persons, of whom the appellant was one, in equal shares. The codicil was made four years later. It recited that by his original will the testator had given the appellant one fourth of the residue and the sum of $5,000, and, revoking this gift, gave to trustees one fifth of the residue and $5,000, to pay the income to the appellant during her life and at her death to distribute the trust property as therein provided. Then, after other changes, the testator revoked the residuary clause in his original will, which divided the residue among four persons of whom the appellant was one, and instead divided it among five persons of whom the appellant was one. The appellant contended, that she was entitled, first to a life estate in one fifth of the residue, and then to one fifth of the remaining residue outright. *Held*, that she was not so entitled; that the provisions of the will and the two provisions of the codicil in regard to the appellant must be taken together, and so construed there was only one residue, one fifth of which was to go to trustees for the benefit of the appellant during her life.

BILL FOR INSTRUCTIONS filed in the Probate Court for the County of Plymouth March 11, 1901, by the executors under the will of Horatio Howard.

In the Probate Court *Harris*, J. made the following decree: "It is decreed that the true construction of the said clauses of said will, is, that the said testator, gave and devised to his trustees for the use and benefit of said Jennie T. Dunbar during her life, and to her issue if any living at her decease, in fee, five thousand dollars, and one fifth part of the rest and residue of his estate." Jennie T. Dunbar appealed.

The case came on to be heard upon the appeal on an agreed statement of facts before *Lathrop*, J., who reserved it for the determination of the full court.

The will was dated August 23, 1892. A codicil was dated January 2, 1896.

After eleven devises and bequests, the will contained the following:

"Twelfth. I devise and bequeath to Jennie T. Dunbar, wife of Eddy P. Dunbar, my homestead estate, containing about five acres of land, situated on Howard and Spring Streets in said West Bridgewater; together with all my household furniture, and five thousand dollars in money, provided, however, that if the said Jennie T. Dunbar leaves no living issue at her death, then the real estate conveyed by this bequest shall revert to my heirs at law."

After three more gifts, came the following:

"Sixteenth. I devise and bequeath to my brother, Charles Howard, his daughters Abigail Bartlett and Isabel Howard, and to the said Jennie T. Dunbar, all the rest and residue of my estate, both real and personal, to be equally divided among them."

The first article of the codicil was as follows:

"First. Whereas by my said will I devised and bequeathed and gave unto Jennie T. Dunbar, wife of Eddy P. Dunbar, one fourth part of the rest and residue of my estate, after the payment of the bequests specified in my said will, and the sum of five thousand dollars, now I do hereby revoke the said legacies, and do devise, give and bequeath unto my trustees hereinafter appointed one fifth part of the rest and residue of my estate and the said sum of five thousand dollars, the income of said one fifth part of the residue and said five thousand dollars to be paid to the said Jennie T. Dunbar semi-annually for her natural life;

and I direct my said trustees or their successors upon the death of the said Jennie T. Dunbar, to pay to her issue, in equal parts if there be more than one, the said sum of five thousand dollars, and the said rest and residue of my estate the share or respective shares of said issue to be paid and transferred to them when they shall respectively attain the age of twenty-one years; but if the said Jennie T. Dunbar shall die leaving no issue, then the said sum of five thousand dollars and the said rest and residue of my estate shall be paid by my said trustees or their successors to my heirs at law."

After seven other changes in the will, came the following:

"Ninth. Whereas in my said will I devised and bequeathed to my brother, Charles Howard, his daughters, Abigail Bartlett and Isabel Howard, and to the said Jennie T. Dunbar, all the rest and residue of my estate, both real and personal; now I do hereby revoke said devise and bequest, and do hereby devise and bequeath unto the said Charles Howard, Abigail Bartlett, Isabel Howard, Jennie T. Dunbar, and E. Bradford Wilbur all the said rest and residue of my estate, both real and personal, to be equally divided among them."

The appellant contended, that "one fifth of the rest and residue of my estate," as used in the first article of the codicil, might mean either of two things. It might mean one fifth of all that would remain after the payment of all the legacies and devises provided for by the will and codicil, and in that case the ninth article disposed of the other four fifths; or it might mean, one fifth part of the estate that would remain after the payment of the legacies and devises provided for in the will of 1892 only, so that in administering the estate the executors would pay those legacies, then take out a fifth for the trust, then proceed to pay the legacies provided for in the codicil, and then divide among the five persons named in the ninth article all that might remain. The appellant contended, that either construction legally was permissible, and that either would give her two legacies instead of one.

R. O. Harris, for the executors.

D. L. Smith, for Jennie T. Dunbar.

H. B. Wilbur & D. J. Sheerin, for Charles Howard and his daughters.

HAMMOND, J. The original will contained various gifts. In the twelfth clause there is a gift to the appellant Jennie T. Dunbar of an interest in certain real estate, and of some household furniture "and five thousand dollars in money." In the sixteenth clause all the rest and residue of the estate real and personal is given to four persons, one of whom is the appellant, in equal shares. This will is dated August 23, 1892.

Between three and four years afterwards, the testator concluded to make some changes in the provisions of the original will, modifying some of the gifts, revoking others, and adding some new ones; and he sat down to make the codicil dated January 2, 1896. He first considered the case of the appellant. He saw the provisions he had made for her in the twelfth and sixteenth clauses of his will as above recited, and he proposed to change them. In the first clause of the codicil he recites that by his original will he had given to the appellant "one fourth part of the rest and residue of my estate, after the payment of the bequests specified in my said will, and the sum of five thousand dollars," and then he revokes this gift and gives to the trustees "one fifth part of the rest and residue of my estate and the said sum of five thousand dollars," to pay the income thereof to her during her life, and at her decease to divide the trust property as therein particularly set forth.

He then proceeds with the changes in the provisions as to other persons, and at last, by the ninth clause in the codicil, he revokes the sixteenth clause in his original will, by which he had designated the appellant and three other persons to be his residuary devisees, and gives unto the said four persons and one Wilbur all the rest and residue of his estate, "both real and personal, to be divided equally among them."

The appellant contends that as the result of the will and codicil she is entitled to one fifth part absolutely and in fee of all that passes by the ninth section of the codicil, and that this section disposes only of that part of the estate which will remain after all the devises and legacies, including the one fifth mentioned in the first clause of the codicil, have been paid.

This position is unsound. The will and codicil are to be taken together. The rest and residue named in the first clause of the codicil is the same as that named in the ninth clause, and

means the remainder after the specific gifts have been satisfied. Both clauses are to be considered together, and the true interpretation of the will and codicil is that the appellant is one of the five residuary devisees among whom the property is to be equally divided, but that her share is to be placed in trust as provided in the first clause of the codicil.

Decree affirmed.

WILLIAM H. BAIN *vs.* HYMAN I. ATKINS & another.

Suffolk. March 18, 1902. — April 3, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Equity Jurisdiction, Bill to reach and apply. *Insurance against Liability. Trust.*

One holding a judgment against a building contractor, who has become bankrupt, for injuries received through the negligence of one of his workmen, cannot maintain a bill in equity to reach and apply the insurance money from a policy held by the contractor against such accidents, if before the bill was filed the insurance company had paid the contractor a sum of money in final settlement of its liability in good faith and without knowledge of the contractor's financial condition. *Whether*, if the bill had been filed before the payment and while there was an existing obligation from the insurance company to the contractor, the plaintiff could have compelled the application of that obligation to the satisfaction of his claim, was not considered.

Insurance money due under a policy against liability to third persons does not constitute a trust fund for the benefit of the person whose injury caused the liability.

BILL IN EQUITY, filed January 19, 1898, and amended February 12, 1901, by an infant, by his mother and next friend, having a judgment against the defendant Atkins for $7,000, wholly unsatisfied, to reach and apply insurance of $5,000 under a policy issued to the defendant Atkins by the defendant the Union Casualty and Surety Company toward the payment of the plaintiff's judgment.

The case came on to be heard before *Morton*, J., who, with the consent of the parties, reserved it for the consideration of the full court, such decree to be entered as equity and justice might require.

Certain facts were agreed to by the parties before the com-

missioner appointed to take testimony. It appeared, that the defendant Atkins was engaged as a contractor and builder in putting an additional story on a certain building on North Russell Street in Boston, and was in control of the work there; that the material used consisted chiefly of brick, and that one of the workmen of the defendant Atkins allowed a brick to fall from the staging used in the work, and the brick struck the plaintiff, a boy of ten years, on the head. The judgment alleged in the bill was obtained in an action of tort brought for injuries thus caused.

The justice made the following findings of fact: The accident occurred while the plaintiff was in the street near the sidewalk next the building where the defendant Atkins and his men were at work. The plaintiff was passing diagonally across the street toward the building. After the verdict, the defendant insurance company disputed its liability to the defendant Atkins under the policy, on the ground that he had not fenced the sidewalk, and had not obtained a permit, as required by the ordinances. The defendant Atkins had put up obstructions at each end of the building on the sidewalk, and there were one or two heaps of bricks and sand along the edge of the sidewalk. Atkins had obtained a permit from the proper authorities August 19, 1895. The insurance company assumed the defence of the action, having the right to do so under the policy. It offered the plaintiff, in behalf of the defendant Atkins, $3,000 in settlement. This was refused by the plaintiff, the case proceeded to trial, and the plaintiff obtained a verdict for $7,000 in November, 1897. A motion for a new trial was made, which was overruled March 31, 1899, and exceptions, filed December 14, 1897, were allowed, but were subsequently dismissed for want of prosecution. Judgment on the verdict was entered for the plaintiff, and execution issued on December 4, 1899.

The attorneys of the insurance company continued to act as counsel for Atkins until January 14, 1898, when, by direction of the company, they withdrew. On January 10, 1898, the insurance company made a settlement with the defendant Atkins for any and all liability to him by it under the policy for the sum of $3,000 in cash. This settlement was made in good faith on the part of the insurance company. It gave the plaintiff no

notice of the proposed settlement and it received from the plaintiff no notice forbidding it to settle. It had no notice that this bill was contemplated, or of the bringing of it, until it was actually brought.

At the time of the settlement a judgment had been obtained against Atkins for $185, and he had been cited into the poor debtor court on execution. But this matter was then in process of settlement, and afterwards was settled. Later other demands proceeded to judgment and execution against him; but these also were paid. It did not appear that the insurance company knew of these demands. If it had not been for the judgment constituting the plaintiff's claim in this case the defendant could have gone on with his business of contractor and builder. Since the judgment, and in consequence thereof, he had gone into bankruptcy. The insurance company had no actual knowledge of the defendant's financial condition at the time of their settlement with him. The settlement was not made for the purpose of enabling Atkins to avoid his liability to the plaintiff, or for the purpose of enabling the insurance company to avoid its liability, if any, to the plaintiff to the full amount of its policy. It was made as in the ordinary course of business between two parties, one of whom wanted to get all he could, up to the full amount of his demand, and the other of whom wanted to settle for as little as it could without injuring its reputation for fair dealing with those who insured with it. Atkins put into his business the money which he received, and used it in paying bills and in other ways, but did not use any of it to pay the plaintiff's demand. A consequence of the settlement was that the plaintiff had been unable to collect his judgment in whole or in part.

W. B. Grant, (*T. H. Buttimer* with him,) for the plaintiff.

R. W. Nason, for the defendant insurance company, was not called upon.

BARKER, J. It is now settled by the findings and the agreed facts that when the plaintiff began this attempt to reach in liquidation of his claim against Atkins a supposed obligation to Atkins on the part of the Union Casualty and Surety Company that obligation was no longer in existence. The bill was filed on January 19, 1898. Nine days before that date, the supposed

obligation, disputed by the company, had been ended by an actual payment of money then made by the company to Atkins on a settlement made in good faith on the part of both and without notice to either of any claim on the part of the plaintiff in the obligation or founded upon it. The settlement was not made for the purpose of enabling Atkins to avoid his liability to the plaintiff nor of enabling the company to avoid any liability to the plaintiff. When it was made the company had no knowledge of Atkins' financial condition. The settlement is found to have been made as in the ordinary course of business between two parties one of whom denied all liability and wanted to settle for as little as it could without injuring its reputation for fair dealing with those who insured with it and the other of whom wanted to get all he could up to the full amount of his claim. Atkins put into his business the $3,000 which he received in the settlement, and had it not been for the judgment of $7,000 afterwards recovered against him by the plaintiff in the action of tort for personal injuries then pending Atkins could have gone on with his business. He went into bankruptcy in consequence of that judgment, and has paid nothing upon the judgment and the plaintiff has been unable to collect the judgment in whole or in part.

We do not consider whether if when the bill was brought the company had been under an existing obligation to indemnify Atkins against the plaintiff's demand the latter could have compelled in equity the application of that obligation to the satisfaction of his claim against Atkins. The fact that when the plaintiff sought the aid of an equity court there was no such obligation is conclusive against the contention that there was an equity springing from such an obligation.

Therefore the plaintiff is compelled to contend that the obligation of the company upon the happening of the accident constituted a fund for the benefit of the plaintiff impressed with a trust for him; that such a trust fund could be paid to Atkins if at all only to reimburse him after he had satisfied his own liability to the plaintiff and that the company's settlement with Atkins without the consent of the plaintiff was in the company's own wrong and void as to the plaintiff.

The essence of this contention, without which no part of it

can stand, is that the insurance constituted a trust fund for the benefit of the plaintiff, and for this there is no ground.

The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against legal liability for damages respecting injuries from accidents to any person or persons at certain places within the time and under the circumstances defined. It contains no agreement that the insurance shall enure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins.

Most of the cases cited in support of the plaintiff's contention are entirely wide of the mark. In all of them the obligation which the plaintiff sought to apply to the extinguishment of his demand existed when he brought his suit.

In *Anoka Lumber Co.* v. *Fidelity & Casualty Co.* 63 Minn. 286, *Hoven* v. *Employers' Liability Assurance Co.* 93 Wis. 201, and *Fritchie* v. *Miller's Pennsylvania Extract Co.* 197 Penn. St. 401, the liability of the insurer was sought to be reached by process of garnishment. In *American Employers' Liability Ins. Co.* v. *Fordyce*, 62 Ark. 562, and *Fidelity & Casualty Co.* v. *Fordyce*, 64 Ark. 174, the question was whether the insured must first pay the judgment in favor of the employee before an action could be brought upon the policy. In *Fenton* v. *Fidelity & Casualty Co.* 36 Ore. 283, the action against the insurer by a surgeon who had attended an injured employee was allowed because of an assignment to the plaintiff of the cause of action. In *Embler* v. *Hart-*

ford Steam Boiler Inspection & Ins. Co. 158 N. Y. 431, the decision was that a suit could not be maintained by an assignee of the administratrix of an employee who had been killed by an explosion against the insurer upon a policy issued to the employer. The decision was put by the majority of the court upon the ground that there was no such relation between the employee and his employer, and no such privity on the part of the employee to the contract of insurance as gave him or his representatives a right of action upon the policy of insurance. It is to be noted that this policy was written before the enactment of the N. Y. St. 1892, c. 690, § 55, which authorizes an employer to take out insurance for the benefit of his employees. The case of *Beacon Lamp Co.* v. *Travellers Ins. Co.* 16 Dick. 59, was overruled by the court of last resort, which held that the obligation of the insurer was with the employer only and left the person who had the claim for damages on account of the accident to rely only on obligations from the insurer to the employer existing when the bill was brought. *Beacon Lamp Co.* v. *Travellers Ins. Co.* 16 Dick. 59. *Hunt* v. *New Hampshire Fire Underwriters Association*, 68 N. H. 305, grew out of the reinsurance by a solvent company of part of a fire risk first reinsured in part by a company which became insolvent after the loss by fire; and the right of the original insurer to the fund was a right in equity to avail itself of a then subsisting provision made by his insolvent debtor, the first reinsurer, for the payment of the claim of the original insurer. Neither that case nor those of the class of *Locke* v. *Homer*, 131 Mass. 93, or *Keller* v. *Ashford*, 133 U. S. 610, are put upon the ground of a trust.

If the usual result of insurance against liability for damages respecting accidental injuries to others was to give money to the insured when he was not obliged to compensate the person injured, it would be for the Legislature to say whether such insurance should not be prohibited as contrary to public policy. The insurance written by the policy held by Atkins was in fact permitted by our statutes and for his own benefit and not for that of the persons whose injuries might give them a claim against him. The fact that owing to his bankruptcy the plaintiff's claim cannot be satisfied although he has in fact received the insurance money or a part of it, cannot make that a trust fund which

neither the statute which allowed the contract nor the contract which created the fund impressed with a trust. Atkins had as full a right to settle with the company and to use in his business the proceeds of the settlement as to deal at his will with any other part of his property, and the company had a right to settle with him as it did.

Bill dismissed with costs.

ISAAC S. BORLEY *vs.* HENRY ALLISON.

Worcester. January 7, 1902. — April 4, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Libel. Evidence. Agency. Practice, Civil. Rules of Court.

In an action for libel by one partner of a former firm of insurance agents against the other, the alleged libel consisted of a circular letter sent by the defendant to the various insurance companies represented by the agency. The defendant objected to the exclusion of a letter sent by the plaintiff to the special agents of the insurance companies, three days before the defendant's circular, making charges against the defendant, and of a report thereon of a committee exonerating the defendant. The defendant's circular did not refer to the plaintiff's letter, and it did not appear that the defendant knew of the plaintiff's charges against him when he wrote the alleged libel. *Held*, that the exclusion was right.

In an action for libel, a postscript to a letter relating to the business carried on at the defendant's office, written by one in charge of the office under the defendant and speaking of the plaintiff's "crooked manner of doing business," is admissible to show malice on the part of the defendant. It could be found that the agent acted within the scope of his authority.

Rule 31 of the Superior Court requires a verification by affidavit as a condition precedent to hearing a motion for a new trial founded on facts not apparent upon the record. When the preliminary verification by affidavit has been made, the motion comes on for hearing upon contested facts like any other motion. LATHROP, J., although delivering the opinion of the court, stated his own view to be that under the rule a judge in his discretion might hear oral testimony on a motion for a new trial when no affidavit had been filed.

On a motion for a new trial founded on the alleged fact that some of the jury were biassed and had expressed views against the party making the motion, and that this did not come to the knowledge of the party or his counsel until the trial was in progress, the fact that the party making the motion had made during the trial a previous application to the judge in the lobby, does not dispense with the requirement of Rule 31 of the Superior Court, that facts not appearing on the record shall be verified by affidavit before a motion founded upon them can be heard. The previous application is only material to show that the matter was called to the attention of the judge as soon as it was known.

TORT FOR LIBEL. Writ dated October 25, 1899.

At the trial in the Superior Court before *Hardy*, J., the jury returned a verdict for the plaintiff in the sum of $4,500; and the defendant alleged exceptions.

W. H. Atwood & C. A. Batchelder, for the defendant.

H. Parker & W. P. Hall, for the plaintiff.

LATHROP, J. This is an action of tort for libel. The answer contains a general denial, sets up the truth of the charges, and alleges that the communication was privileged. The plaintiff and defendant were partners in the insurance business, under the firm name of Allison and Borley; and the alleged libel was contained in a circular letter written by the defendant to the various insurance companies represented by the agency of Allison and Borley, after a notice of the dissolution of the firm had been given by the defendant, and after the plaintiff had made charges in writing against the defendant affecting his integrity, to the special agents of the companies represented by the firm, resulting in the appointment of a committee of such agents to investigate the affairs of the firm, and while the office was in charge of an agent.

The jury returned a verdict for the plaintiff; and the case is before us on the defendant's exceptions.

1. The first exception is to the exclusion of evidence of the charges made by Borley and the report thereon of the committee appointed to investigate the charges, which exonerated the defendant. There was evidence that this investigation was had at the request of the plaintiff. His charges were dated December 21, 1898; and the alleged libel was dated three days later. The report of the committee was dated January 30, 1899.

The defendant contends that his communication was a privileged one, being made to the insurance companies which his agency represented, and that therefore the charges made against him by the plaintiff and the report of the committee thereon were admissible. One attacked by a slander or libel has a right to defend himself, but he has no right to turn his defence into a slanderous or libellous attack, unless it clearly appears that such attack was necessary for his justification. See Odgers on Libel & Slander, (3d ed.) 251 *et seq.* The plaintiff's charges attacking the defendant were addressed to the special agents of the

insurance companies, who were asked to make an investigation. The defendant's letter was sent to the insurance companies. It contains no word of defence of the charges made by the plaintiff, and apparently was written in ignorance that such charges had been made, but makes charges against the plaintiff. It concludes with the sentence: "The subscriber regrets the annoyance that may be caused the various companies, some of whom he has represented many years, and would request that after such an investigation that may be necessary to ascertain the truth of the foregoing, your agency may be reissued to the writer." We find nothing in the bill of exceptions to show that the defendant knew of the plaintiff's charges against him when he wrote the alleged libel, and the latter cannot therefore be considered as a reply to the charges made by the plaintiff; nor are the charges, under such circumstances, admissible in mitigation of damages, on the ground of provocation.

2. The second exception relates to the admission in evidence of a postscript to a letter written by one Batchelder to one Fessenden, and dated December 17, 1898, in which the plaintiff's "crooked manner of doing business" was mentioned. This evidence was admitted solely for the purpose of proving malice. There was evidence that Batchelder was put in charge of the office by the defendant, after the plaintiff was excluded, and acted under the defendant's instruction; and the jury might well infer from the contents of the letter that it related to the business carried on at the defendant's office, and that Batchelder acted within the scope of his authority. If so, the defendant would be responsible for his acts. See *Curtis* v. *Mussey*, 6 Gray, 261; *Zinn* v. *Rice*, 161 Mass. 571; *Marsh* v. *Hammond*, 11 Allen, 483. We are therefore of opinion that the second exception must be overruled.

3. The third exception relates to a motion for a new trial. On the morning of the second day of the trial, the counsel for the defendant, in the presence of the counsel for the plaintiff, said to the presiding judge, in the lobby, that it had come to his knowledge that morning for the first time that one of the jurors had formed and expressed an opinion, and was biassed and prejudiced against the defendant, and that the juror had made threats against the defendant in conversation concerning the case on

trial; and offered to produce a witness to substantiate the statement, and requested the court to investigate the affair fully. The court declined to act then, and reserved the matter to be acted on later, if necessary.

After the verdict in favor of the plaintiff, the defendant filed a motion for a new trial, one of the grounds being as follows: "Because the jury or some of them prior to the impanelling had formed and expressed an opinion and were biassed and prejudiced against the defendant, which fact did not come to the knowledge of the defendant or his counsel till after the trial was in progress."

At the hearing upon this motion the counsel for the defendant called the court's attention to the statement previously made in the lobby concerning the juror, and stated that he was unable to get an affidavit to file in support of the allegation of fact in the motion, the witness refusing to make one, but that the witness was present upon a subpœna; and the counsel offered oral evidence in support of this ground of the motion for a new trial. The plaintiff's counsel objected on the ground that the offer was in violation of Rule 31 of the Superior Court, and the court declined to hear any oral testimony in support of the motion, and rejected the testimony. The motion for a new trial was overruled.

The case was tried at the November sitting of the court in the year 1900. The rules then in force were passed on February 3, 1900, and took effect on the first Monday in July of that year. Rule 31 of the common law rules reads as follows:

"The court will not hear any motion grounded on facts, unless the facts are verified by affidavit or are apparent upon the record and the papers on file in the case, or are agreed and stated in writing, signed by the parties or their attorneys. And the same rule will be applied to all facts relied on in opposing any motion."

This rule is in accord with Rule 18 of the rules which took effect on January 1, 1860, and with Rule 21 of 1874. Rule 33 of the rules which took effect on July 1, 1886, contained the words "oath or affirmation," instead of the word "affidavit." This is in accord with Rule 12 of the common law rules of our court.

A majority of the court is of opinion that Rule 31 of the Superior Court requires a verification by affidavit as a condition precedent to the right of the party making the motion to be heard upon its allowance, and that as no affidavit was filed in the present case the judge rightly refused to hear testimony and overruled the motion. The majority is also of opinion that, the preliminary verification by affidavit required by the rule having been made, when a motion comes on for hearing upon contested facts it is to be heard like any other motion.

My own view as to the construction of the rule is that it has been settled by the decision of this court in *Spaulding* v. *Knight*, 118 Mass. 528, that an affidavit is not essential as a preliminary requirement to the hearing of a motion for a new trial, and that the judge in his discretion may hear oral testimony, although no affidavit has been filed. It seems to me, therefore, that the judge in the case before us might in his discretion have admitted or rejected oral testimony; but that, as there is nothing in the bill of exceptions to show that he did not reject the testimony as matter of discretion, the excepting party has no ground of complaint.

We see no force in the argument of the counsel for the defendant that the rule does not apply because of the previous application to the court in the lobby. The question arose on the motion for a new trial, and the previous application was of importance only to show that the matter was called to the attention of the judge as soon as it was known.

It is further urged that the rule cannot in any way abridge the rights of the parties under the Pub. Sts. c. 153, § 8. This section gives the right to a party aggrieved by "an opinion, ruling, direction, or judgment of the court in matters of law," to "allege exceptions thereto"; and it applies to motions for a new trial, but it has no application to this case.

Exceptions overruled.

LENA MARKS *vs.* METROPOLITAN STOCK EXCHANGE.

Suffolk. March 10, 1902. — April 4, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Wagering Contracts. Evidence.

Semble, that in an action under St. 1890, c. 437, for payments made on wagering contracts, a plaintiff's testimony that "she meant to buy the stock on margin" and that "she did n't mean to buy it outright, but just to speculate" imports a real transaction and not a wager.

In an action under St. 1890, c. 437, for payments made on wagering contracts, if it appears that the plaintiff put money into the hands of her husband, expecting him to speculate with it in actual transactions by employing a broker to buy stock for her and carry it on a margin and that the stock should be received and paid for, but left the whole matter to her husband, and her husband entered into a transaction with the defendant which both of them knew to be a wager under the guise of a purchase and sale, there is evidence that the plaintiff had no intention to perform the contract in question and that the defendant had reasonable cause to believe that no intention to perform existed; and testimony of the plaintiff that she intended her husband to enter into an actual transaction is immaterial, such intention not having been disclosed to the defendant.

In an action under St. 1890, c. 437, for payments made on wagering contracts, it appeared, that the plaintiff, through her husband as agent, made a contract which purported to be for the purchase and sale of a certain stock, that no stock was in fact delivered under the contract, and that the contract was terminated by the fall of the market price of the stock to a point where by the terms of the contract the plaintiff's deposit of cash was forfeited and became the absolute property of the defendant. *Held*, that this was a "settlement" within the meaning of § 4 of the statute and under that section was prima facie evidence that the plaintiff had no intention to perform the contract and that the defendant had reasonable cause to believe that she had no such intention.

CONTRACT, under St. 1890, c. 437, for $400 alleged to have been paid upon contracts for the purchase of stock which the plaintiff had no intention to perform and which the defendant had no reasonable cause to believe the plaintiff intended to perform. Writ dated May 18, 1901.

At the trial in the Superior Court before *Hardy*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. F. Ordway, for the defendant.

C. W. Rowley, for the plaintiff.

LORING, J. The transaction which the husband of the plaintiff testified that he entered into with the defendant corporation

in her behalf is the typical transaction aimed at by the first clause of the second section of St. 1890, c. 437.

He testified that he went to the defendant's office and, through one Nichols, whom he met there, paid to the defendant $200 and received from it a contract whereby the defendant promised "on three days' notice" to deliver to Nichols twenty shares of the stock of the United States Steel Company "at 53 1-4 and the holder of this contract agrees to receive the same; or upon surrender by mutual consent of this contract said corporation agrees to pay the holder of it a sum equal to the then advance in the market price of said commodity or stock. All deposits shall become the absolute property of said corporation to the amount of the decline in the market value of said commodity or stock when this contract is closed, either by further order of the holder, or when the decline in the market value of said commodity or stock shall equal the sum of all deposits, whereupon this contract terminates." In addition to the $200 deposited by the plaintiff's husband when the contract was made, he deposited a second $200 a few days later. When the contract was produced in court, there were entered on the left hand margin the two sums of $200 under the heading "Deposit"; and on the right hand margin of the contract, under the heading "Order limit" and opposite the first deposit of $200, there was entered "43 1-4," and opposite the second deposit, "33 1-4." That means that on payment of the first $200 the plaintiff was protected until the price of the stock of the United States Steel Company fell to $43.25 a share, and, when the stock of that company declined so as to reach that price, the plaintiff forfeited all the deposits, under the clause of the contract providing that "all deposits shall become the absolute property of said corporation to the amount of the decline in the market value of said . . . stock when this contract is closed, . . . or when the decline in the market value of said . . . stock shall equal the sum of all deposits." And so, on payment of the second $200, the plaintiff was protected until the stock fell to $33.25 a share, and on the price of the stock falling to that amount all deposits were forfeited, by the term of the contract stated above. This contract was spoken of in the testimony of the plaintiff's husband as a "ticket." Later, the plaintiff's husband came to the office of the defendant with another

$300, and on entering the office heard that "the stock was going down"; and although he tried to reach the counter, he was prevented from doing so by the crowd, and when he reached the counter he was told that he was too late, that he was "wiped out," and the man behind the counter refused to take his money and "the stock went down to 24, and in about two seconds rose again to 32."

Nichols, through whom the plaintiff bought the ticket in question, when asked what became of the "deal," testified that "it expired and the market ran out." He characterized the contract which we have spoken of as a "long ticket," and, on being asked what he did with the $200 handed him by the plaintiff's husband, he testified that he put it in stocks, according to the contract which has been referred to, and that he could not tell "whether it was a short ticket or a long one." And, finally, in describing the commission to be paid to him for his services, he testified that he was to receive "one dollar on twenty shares, from Mr. Marks, if he won."

The transaction testified to by the plaintiff's husband, and by Nichols, is plainly a device to make a wager under the guise of a contract for the purchase and sale of shares of stock; if the price of the stock of the United States Steel Company fell below thirty-three and one quarter, the price to which the holder of the long ticket was protected by payment of $20 a share margin, the plaintiff lost; if it rose above the price named, fifty-three and one quarter, before it fell below thirty-three and one quarter, he won, and, by calling for fulfilment of the contract, could collect his winnings. The terms of the contract put in evidence contemplate a wager, and the language of both witnesses throughout is the language of a wager and not of a real transaction. *Ballou* v. *Willey*, 180 Mass. 562.

The defendant's answer to this is that on the plaintiff's own testimony a real transaction was intended by her. She testified that "she meant to buy the stock on margin." It is true that the statement that "she meant to buy the stock" imports a real purchase of stock, and we are of opinion, for the reasons hereinafter stated, that the natural import of these words is not done away with by the addition of the words "on margin." The plaintiff also testified that "she did n't mean to buy it outright,

but just to speculate." The statement that a customer employs a broker to buy stock for him and carry it on a margin imports that the stock shall be actually bought and actually received by the broker; and if, in such a case, the stock is actually bought and actually received by the broker, the transaction is not within St. 1890, c. 437. *Rice* v. *Winslow*, 180 Mass. 500. Where a customer employs a broker actually to buy stock and carry it on a margin, the transaction would be properly described as one where the customer "did n't mean to buy it outright, but just to speculate"; and we are of opinion that the defendant is right in its contention that this testimony imports a real transaction, that is to say, imports that the plaintiff did have an intention to have her husband receive the stock which she empowered him to buy, or to have that stock received in her behalf by some person employed by her husband to buy it in her behalf. If the plaintiff had told the defendant what she testified was in fact her intention and that was all the evidence in the case, there would be no evidence that the plaintiff had no intention to have the stock received from the purchaser. But, in a suit against the person of whom the stock was bought, the question whether the plaintiff intended to receive the stock or have her husband receive the stock within the first clause of St. 1890, c. 437, § 2, is not a question of her undisclosed mental determination nor her intention as disclosed to her agent, but her intention as disclosed to the person from whom she seeks to recover under that act.

There is nothing in *Crandell* v. *White*, 164 Mass. 54, to the contrary. In that case there were two causes of action on trial; one against Wonson, who was employed to buy stock for the plaintiff, and one against White, of whom the stock was bought. Wonson was called as a witness by the plaintiff, and under a general objection by the defendant White but without objection by Wonson, was allowed to testify that "he had no intention of paying the full amount of $4,950 personally, nor did he have any idea of paying out the first $100, because it was not his property; and that he had no intention at any time of taking 100 shares of the stock as for himself personally." No objection was made by Wonson. The court held that as against Wonson it was competent to show that he had no intention to perform the purchase, and "if White wished the testimony to be limited to its

effect as against Wonson himself, assuming that it should have been so restricted, he should have requested the court so to limit it." In the action against Wonson the issue properly was whether the plaintiff had no intention that the contract to be made by Wonson in his behalf should be performed, and whether Wonson had reasonable cause to believe that she had no such intention.

The testimony of the plaintiff in the case at bar that she intended her husband to enter into a real transaction is immaterial; she left the whole matter to her husband and he entered into a transaction which imported that there was to be no real purchase and sale, but a wager under the guise of a purchase and sale. In such a case, we are of opinion that there was evidence that the plaintiff had no intention to receive the stock which she contracted to buy. As we have said, the intention referred to by the statute is not the undisclosed intention of the plaintiff, but the plaintiff's intention as disclosed by the transaction entered into, by acts done in pursuance thereof, which are competent as evidence of the plaintiff's intention "at the time of the contract," or by any other acts by which her intention is disclosed to the defendant. We are therefore of opinion that in the case at bar there was evidence that the plaintiff had no intention to perform, and that the defendant had reasonable cause to believe that she had no intention to perform, the contract in question.

We are also of opinion that, apart from this, there was evidence in the case at bar of no intention to perform on the part of the plaintiff, and reasonable cause to believe, on the part of the defendant, that there was no such intention to perform by the plaintiff. It was proved that no stock was in fact delivered under the contract made by the plaintiff, through her agent, with the defendant, and that the contract was terminated by the decline in the market value of the stock to the amount of $400 and more, in which case, by the terms of the contract, all deposits made by the plaintiff became the absolute property of the defendant. In our opinion, this was a "settlement" within § 4 of St. 1890, c. 437, and is prima facie evidence that the plaintiff had no intention to perform and that the defendant had reasonable cause to believe that she had no intention to perform.

Exceptions overruled.

ALBERT F. DEMONTAGUE *vs.* SOLOMON BACHARACH & another.

Suffolk. November 14, 1901. — April 7, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Contract, Implied, Rescission.

One cannot recover for money paid and labor performed under an oral agreement within the statute of frauds without showing that the contract was unenforceable by reason of the defendant setting up the defence of the statute.

One who has enjoyed for ten months the privilege of conducting a restaurant in connection with the bar room of another under an agreement with the proprietor of the bar room giving him such privilege for two years, if the proprietor turns him out in violation of the agreement, cannot rescind the contract and recover back the payments made under it, because he cannot return the benefits he has received.

CONTRACT upon an account annexed of forty-seven items, twenty-five for ten per cent of the gross receipts of a restaurant amounting to $430.43, ten for money paid for gas bills amounting to $218.76, nine for electric light bills amounting to $89.03, one for money paid as salary of a porter amounting to $128, one for extra help employed for the benefit of the defendants amounting to $287, and one for labor performed and furnished by the plaintiff as superintendent at the request of the defendants amounting to $375. Writ dated August 21, 1899.

The answer consisted of a general denial and an allegation of payment. There was also a declaration in set-off.

At the trial in the Superior Court before *Aiken*, J., the jury returned a verdict for the plaintiff in the sum of $506.15; and the defendants alleged exceptions.

H. H. Baker, (*W. A. Hayes* with him,) for the defendants.

J. J. McCarthy, (*C. J. Rolfe* with him,) for the plaintiff.

LORING, J. The defendants in this case were the lessees of a basement fitted up in part as a bar for the sale of liquor and in part as a restaurant. In pursuance of an oral agreement between the plaintiff and the defendants, the plaintiff ran the restaurant for his own account from August 1, 1898, to July 1, 1899. There was a direct conflict in the evidence of the two as

to the terms of the oral agreement, and also as to whether the plaintiff left voluntarily or was put out by the defendants. Soon after he left, the plaintiff brought this action in which he seeks to recover from the defendants all the sums paid by the plaintiff for the privilege of running the restaurant, for gas and electric light bills paid by him, and also for some work done at the defendants' request; these amounted to $1,528.22; the defendants declared against the plaintiff in set-off for the reasonable value of the use of the restaurant and the utensils belonging to them and for gas and electric light bills incurred by the plaintiff, which they had to pay, amounting in all to $3,082.57. The case went to an auditor, whose report is not material. At the trial the plaintiff was given a verdict by the jury, and the case comes here on the defendants' exceptions.

The plaintiff's story was that he was to have the premises to the end of the defendants' lease which had about two years to run on August 1, 1898, when the plaintiff was let into possession. The defendants testified that the original agreement was that the plaintiff was to have the restaurant until January 1, 1899, and that there was no agreement as to the duration of the arrangement after that date. The conflict between the plaintiff and the defendants was not confined to the time during which the arrangement was to last, but extended to nearly every particular of the arrangement, and there was evidence that the agreement was changed from time to time while it lasted.

The jury were told that the first question for them to determine was what the agreement between the parties ultimately was, and the next question was, who ended the agreement; if the plaintiff ended it, he could recover nothing; but if the defendants ended it, "the plaintiff is entitled to fair remuneration for the benefits that he conferred upon the defendants"; and in ascertaining the amount due, if anything is due the plaintiff, a balance must be struck and, after ascertaining what remuneration is due the plaintiff for benefits conferred upon the defendants, there must be deducted therefrom the "benefits DeMontague enjoyed in the way of what is spoken of as rent, in the value of the enjoyment of the premises, and any other elements of benefit which appear in the papers and in the case

that he had while he was in occupation, and you set the two classes of benefits one against the other."

The plaintiff contends that he can keep his verdict on either one of two grounds, namely: First, that the contract was within the statute of frauds and under the finding of the jury was repudiated by the defendants; and second, on the ground that he had a right to rescind the contract on the defendants' committing a breach of it.

But we are of opinion that neither ground is tenable.

The difficulty in the way of the plaintiff's keeping the verdict on the first ground is that, under the instructions of the presiding judge, the plaintiff is allowed to sue the defendants outside of the oral contract for all sums paid under it on the defendants committing a breach of it. If one renders value to another under an oral contract within the statute of frauds for which he has been paid nothing, he is entitled, on the defendant setting up the defence of the statute, to recover outside of the contract the market value of the property received under it. But this right of recovery does not arise on the defendant committing a breach of the contract without having set up that the oral agreement is not enforceable. In this case, there was evidence that the contract was within the statute of frauds, but there is no statement in the bill of exceptions that the defendants have ever set up the defence of the statute, and the jury were not told that the plaintiff's right to recover the sums sued for depended on the defendants having set up that the oral agreement was unenforceable.

In this case there was evidence that the contract was within the statute of frauds as a contract not to be performed within a year.

It was not a contract for an interest in land; it was admitted that when the plaintiff first began to run the restaurant there was no division between the bar and the restaurant; the two were separated by a screen, and later on, when this screen was replaced by a partition, "an open space was left at each end of the partition, and patrons and servants could pass freely between the tables and bar, and customers at the tables were served with drinks from the bar. There was a toilet room in the corner beside the bar, which was used indiscriminately by the patrons of

both restaurant and bar. There were no separate doorways from the street to the bar and restaurant, but the doorways on both streets were used indiscriminately by the patrons of both bar and restaurant." The plaintiff himself testified that he "had no keys to the premises and they were opened and closed by the defendants' employees," and that when he asked the defendants for a lease, the defendants told him that his "lease that he had there would n't allow him to sublease to anybody else." Under these circumstances, although the sums to be paid to the defendants were spoken of as rent, it is plain on the admitted facts that he did not have an exclusive right to the possession of any part of the basement, but that this was a case where he had been given a license or privilege of running the restaurant on premises which remained in the legal possession of the defendants. *Johnson* v. *Wilkinson*, 139 Mass. 3. *White* v. *Maynard*, 111 Mass. 250, 253.

But if the arrangement was to continue for the residue of the term of the defendants' lease, the contract was within the statute as a contract not to be performed within a year.

It is not plain from the bill of exceptions what the course of the trial was in the case at bar. It is stated in the beginning of the bill that "the plaintiff claimed that the sums paid, labor performed and benefits conferred, as alleged in the account annexed, were paid, performed, furnished and conferred under a verbal contract within the statute of frauds, and repudiated by the defendants before being fully performed." Later it is stated that "during the progress of the trial the court intimating that the statute of frauds was not applicable, although not so ruling formally, the case proceeded, on the part of the defendants, in accordance with such intimation, and the case was in fact so conducted by the court." And finally, it is stated that the rest of the charge not set forth in the bill of exceptions has no bearing on the points raised by the defendants' exceptions, and contained no reference to the statute of frauds.

Although it is not plain what the course of the trial was, it is plain that, under the instructions given to the jury, they could have found that the plaintiff was entitled to recover all sums paid the defendants under the oral agreement on the defendants' committing a breach of that agreement without proof that the

defendants ever set up that the contract was unenforceable by reason of the statute of frauds, and we are of opinion that that was wrong and that the verdict cannot be supported on the first ground.

The second ground on which the plaintiff seeks to keep his verdict is that on the breach of the contract by the defendants, he was entitled to rescind the contract and recover from the defendants what he paid under it. But, as was said in *Handforth* v. *Jackson*, 150 Mass. 149, 154, in case a plaintiff wishes to rescind, the defendant is "entitled to have his property restored to him, not to have its value fixed by a jury," and it is settled that a plaintiff cannot rescind a contract on the defendant committing a breach of it, without putting the defendant *in statu quo*. *Leonard* v. *Morgan*, 6 Gray, 412. *Bassett* v. *Percival*, 5 Allen, 345. *Handforth* v. *Jackson*, 150 Mass. 149. *Marston* v. *Singapore Rattan Co.* 163 Mass. 296, 302. *Gassett* v. *Glazier*, 165 Mass. 473, 480. In the case at bar, the plaintiff had enjoyed the privilege of conducting the restaurant for at least ten months; for that reason he could not put the defendants *in statu quo* and therefore could not rescind the contract on the defendants committing a breach of it.

It is not necessary in this case to consider when or how far a recovery can be had after an oral agreement within the statute of frauds has been performed in part by both parties to it; see *Williams* v. *Bemis*, 108 Mass. 91; *White* v. *Wieland*, 109 Mass. 291; *Dix* v. *Marcy*, 116 Mass. 416; *Miller* v. *Roberts*, 169 Mass. 134; nor is it necessary to consider the other questions raised at the trial.

Exceptions sustained.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK *vs.* FREDERICK L. CUTTING.

Suffolk. March 7, 10, 1902. — April 15, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, & BARKER, JJ.

Insurance Commissioner. Insurance, Life, Valuation of assets of foreign company.

So long at least as the insurance commissioner acts in good faith intending to obey the law, this court by writ of mandamus cannot compel him to change his conclusions either of law or fact in the valuation of the policies or assets of a foreign life insurance company.

PETITION, filed July 1, 1901, for a writ of mandamus to be issued to the insurance commissioner directing him to compute the reserve liability of the petitioner on all policies issued for one year with the privilege of renewal as one year term policies with respect to the first year thereof, and to compute and allow the assets and liabilities of the petitioner as computed in its statement filed in the office of the insurance commissioner on or about February 14, 1901.

The case came on to be heard before *Barker*, J., who reserved it upon the petition, demurrer, answer, and agreed facts, for the determination of the full court.

T. B. Reed (of New York) *& L. S. Dabney*, (*R. Foster* with them,) for the petitioner.

F. H. Nash, Assistant Attorney General, for the respondent.

KNOWLTON, J. This is a petition for a writ of mandamus to compel the insurance commissioner to change his valuation of the outstanding policies of the petitioner, so as to diminish the reserve liability for which it must have assets to meet the requirements of our law. The duty of the commissioner to make this valuation under the R. L. c. 118, § 11, is only a preliminary part of his duty under § 17 of this chapter, annually to "make a report to the general court of his official transactions," in which he shall include among other things "an exhibit of the financial condition and business transactions of the several insurance companies as disclosed by official examinations of the same or by their annual statements, abstracts of which state-

ments, with his valuation of life policies, shall appear therein; and such other information and comments relative to insurance and the public interest therein, as he thinks proper." It is important in one other way. It naturally is used in part as a foundation for action, in case he is called upon under § 7 to revoke or suspend the certificates and authority granted to a foreign insurance company, because he is of opinion that it is "in an unsound condition," or "that its actual funds exclusive of its capital, . . . are less than its liabilities."

The complaint against the respondent is that in applying the rule of computation prescribed by the statute to a certain class of policies issued by the petitioner, he has made a mistake in holding that, for the purpose of ascertaining their reserve value, they are to be treated as being from their inception policies for life or for an endowment period, and not as policies for one year only, with an option in the assured to continue them in force at the end of the year without a further physical examination, and without an increase of premium on account of the greater age of the assured. It is not contended that he has acted in bad faith or has wilfully disobeyed the law. There is only a difference of opinion between the petitioner and the respondent as to the proper application of the rule prescribed by the statute, to the methods of the petitioner in insuring under this class of policies.

A preliminary question is whether the decision of the commissioner in a matter of this kind is subject to revision by this court on an application for a writ of mandamus. In various proceedings affecting foreign insurance companies the statute makes no provision for an appeal from his decision, but treats his conclusion as final. Particularly is this so in the valuation of policies and assets and the determination of the financial condition of foreign companies doing business in this Commonwealth. "Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the commissioner shall be satisfied, by such examination as he may make and such evidence as he may require, that such company is otherwise duly qualified under the laws of this commonwealth to transact business herein." R. L. c. 118, § 6. By the R. L. c. 120, § 10, he has absolute authority to give or withhold his in-

dorsement upon a requisition of the directors for the withdrawal of any portion of an emergency fund deposited by an assessment insurance company with the treasurer of the Commonwealth. Under R. L. c. 120, § 12, the authority granted to a foreign assessment insurance company to do business in this Commonwealth "shall be revoked if the insurance commissioner, on investigation, is satisfied that such corporation is not paying in full the maximum amount named in its policies, or that it has otherwise failed to comply with any provision of this chapter or its own contracts." In regard to the reduction of capital stock of an insurance company, it is provided by the R. L. c. 118, § 37, that, "If the commissioner finds that the reduction is made in conformity to law and that it will not be prejudicial to the public, he shall indorse his approval upon the certificate." By § 67 of this chapter, a company organized under the laws of another State may be admitted to do business in this Commonwealth, if, "in the opinion of the commissioner," it "is in sound financial condition," etc. Section 72 provides that, "No domestic life insurance company shall reinsure its risks except by permission of the insurance commissioner; but may reinsure not exceeding one-half of any individual risk." Under § 78 "No foreign insurance company shall be so admitted and authorized to do business until . . . it has satisfied the insurance commissioner" of numerous facts therein stated. The terms of each of these sections make it plain that the opinion and judgment of the insurance commissioner is to be final and conclusive in determining these important matters upon which the rights of the insurance companies and the protection of the public depend. Most, if not all of these several conclusions involve the consideration of questions of law as well as questions of fact.

In regard to the only important action depending upon the valuation of policies to ascertain the reserve liability of insurance companies, namely, the making of a report to the Legislature and the revocation or suspension of certificates of authority to do business, it seems that the judgment of the commissioner is not subject to revision. Under § 17, he is to make a report of the financial condition of insurance companies and of their transactions and the valuation of life policies, which must mean a report according to his understanding of the facts, founded on

examinations and statements. By § 7 he is to revoke or suspend certificates of authority granted to a foreign insurance company if he "is of opinion upon examination or other evidence that a foreign insurance company is in an unsound condition, that it has failed to comply with the law, or that its actual funds exclusive of its capital, if it is a life insurance company, are less than its liabilities," etc.; and no new business can thereafter be done by such company "until its authority to do business is restored by the commissioner." If the "ground for revocation or suspension relates only to the financial condition or soundness of the company, or to a deficiency in its assets," there is no appeal from a decision of the commissioner. In other cases the company may apply to the Supreme Judicial Court for a reversal of his decision. Here again is an indication that the judgment of the commissioner in all matters of law or fact involved in determining the financial condition of a company for a purpose affecting it even to the extent of terminating its existence as an insurer in this Commonwealth, is to be final and conclusive.

The valuation of policies for the purpose of determining the reserve liability, is only one of the processes necessary to determine the company's financial condition. It involves an application of the statutory rule to each policy, in connection with the methods and practices in the transaction of the business that exist, either as a part of the science of life insurance or otherwise, outside of the stipulations of the policy. New forms of policies may be adopted which were not known when the statutory rule was established, and new questions may arise, depending in part upon the principles of life insurance as a science, and in part upon the practices of the company, as well as upon rules of law, in determining how the statutory rule shall apply to these policies. In the present case, even if the contracts referred to are to be considered technically as the petitioner contends, the statute is silent as to whether the value of the option to continue the insurance at the end of the year without an examination, and at the premium fixed for an age a year younger than the assured would then have attained, is not to be considered in determining the reserve liability of the company under the contract. Questions of fact and questions of law must be answered

in coming to a conclusion. In valuing all the assets of a company, which usually comprise investments of many kinds, such questions must inevitably arise. If we are to examine each policy or class of policies, together with the methods of the company in fixing their premiums, and any other facts pertaining to the policies which are different from those belonging to other kinds of policies, for the purpose of determining whether the insurance commissioner has made a mistake of law in valuing them, we know of no good reason why his valuation of each item of the assets might not be examined to see if it is affected by a mistake of law. A mistake of the latter kind might be as detrimental to the company as one of the former, whether viewed in reference to its effect upon the commissioner's report, or upon his determination to revoke or suspend the certificate of authority. If the commissioner's mistakes of law are to be corrected on an application for a writ of mandamus, his mistakes in the construction of contracts entering into investments should be dealt with, as well as his mistakes in the construction of contracts for insurance. We are of opinion that the statute does not contemplate a revision of the commissioner's decisions in this way. This officer is intrusted with the performance of important duties, and invested with power to use his discretion and judgment in matters which call for prompt and decisive action, and which it would be difficult to investigate in our courts. We are of opinion that at least so long as he acts in good faith, intending to obey the law, we cannot, by a writ of mandamus, compel him to change his conclusions either of law or fact in the valuation of the policies or assets of a life insurance company.

Without considering whether any mistake appears, we must deny the petitioner's application. Similar decisions have been made in regard to the powers of the insurance commissioner in Ohio and in Kansas. *State* v. *Moore*, 42 Ohio St. 103. *Dwelling-House Ins. Co.* v. *Wilder*, 40 Kans. 561.

Petition dismissed.

FRED A. HARFORD *vs.* RANSOM C. TAYLOR.

Worcester. November 11, 1901. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Joint Tenants and Tenants in Common. Ouster, Of cotenant. *Landlord and Tenant,* Water rates. *Damages,* For ouster by cotenant.

If one of two cotenants under a lease being in sole occupation of the premises by permission of the other surrenders possession to the landlord, who puts a new tenant in exclusive possession of the premises, and the recently occupying cotenant delivers to the landlord the lessees' duplicate original of the lease, this is an ouster of the absent cotenant, who can maintain an action in the nature of *quare clausum fregit* against the landlord who became his cotenant by the surrender.

Where there are several tenants in a building and only one water meter, and the lessor has made no attempt to apportion the water rates which his tenants are to pay under their leases, he cannot enter and terminate their leases for non-payment of water rates.

If one of two cotenants under a lease surrenders his interest to the landlord, who puts a new tenant in exclusive possession of the premises ousting the other cotenant, in an action by the ousted cotenant in the nature of *quare clausum fregit* against the landlord, the defendant has a right to an instruction that the jury in assessing damages may take into consideration the fact that after the surrender the plaintiff was a cotenant with the defendant, the interest of his former cotenant having been merged in the fee, and if the value of such an undivided half interest is less than half the value of the whole, that is a fact which the defendant has a right to have the jury consider.

TORT in the nature of trespass *quare clausum fregit.* Writ dated December 15, 1899.

At the trial in the Superior Court before *Gaskill,* J., the judge ruled that the plaintiff was entitled to recover at least nominal damages, and left the case to the jury upon the question of damages. The jury returned a verdict for the plaintiff assessing the damages in the sum of $235; and the defendant alleged exceptions.

Six rulings were requested by the defendant and refused by the judge. The substance of the first five is stated by the court. The sixth ruling, for the refusal of which the defendant's exceptions are now sustained, was as follows: "If the plaintiff had any rights in the premises after the surrender by Brown, it was

only as tenant in common with the defendant, and this fact should be taken into consideration by the jury in assessing damages."

C. T. Tatman, for the defendant.

B. W. Potter, for the plaintiff.

LORING, J. On June 13, 1896, the defendant let the premises in question to the plaintiff and one Brown, for a term of years, beginning on the first day of September following. When the lease was executed the defendant was building a store on the premises, in which Brown and the plaintiff intended to carry on the business of apothecaries as partners. But before September 1, when the term was to begin, "they decided that they would not enter into partnership nor do business together on the premises but that Brown should occupy the store and carry on the business therein on his own account." It further appeared "that the plaintiff never actually occupied the premises, but told Brown to go ahead with the store and that Brown carried on the store as sole owner thereof and occupied it alone until he (Brown) sold out to one Elkind and gave up possession on June 7, 1899." It also appeared that when this arrangement was made between Brown and the plaintiff, the plaintiff saw the defendant's sons, who were his agents, "and that it was orally agreed between them and him that in case one month's rent should overrun they should notify him within ten days; that the plaintiff told them that he was perfectly willing to keep his name on the lease and that at any time he would be responsible for the rent; that as quick as Brown's death or failure or anything of that sort should occur to violate the lease as far as he was concerned, plaintiff was second; that they were perfectly willing plaintiff should do so; that he had spoken to the defendant's sons several times while Brown was in occupation of the premises under the lease, saying that he desired to have them when Brown got through."

As already stated, Brown entered on the demised premises at the beginning of the term and carried on business there as an apothecary for two years and nine months, when, without giving notice to the plaintiff he sold his stock in trade and store fixtures to one Elkind. When he sold to Elkind, Brown, Elkind and the defendant's sons, his agents, went upon the premises; Brown

then "voluntarily" surrendered possession to the defendant, the defendant put Elkind in possession, and Brown delivered the stock in trade and fixtures to him. It also appeared that Brown at or about this time delivered to the defendant the lessee's duplicate original of the lease. Elkind has since remained in possession as tenant at will of the defendant.

This took place on June 7, 1899, but it did not come to the knowledge of the plaintiff "until a week or so after." On June 16, 1899, the plaintiff notified the defendant in writing that he claimed his "rights as one of the lessees named in" the lease, and forbade the defendant "to cancel or surrender said lease to Mr. Wm. A. Brown or any one else." In the following fall, the plaintiff tendered the defendant $17.63 as rent which had not been paid by Brown, but the defendant "refused to give him possession of the premises, saying that Mr. Elkind had the store," and on December 15, 1899, the plaintiff brought this action.

The rent reserved in the lease to Brown and the plaintiff was $850 a year, payable in monthly instalments. Since Elkind has been in possession he has paid the same rent; there was evidence "that the rental value of the premises was $1,200 per year."

While Brown was in occupation of the store he paid all the rent paid, and "receipts were given to Brown in the name of Brown and Harford." On June 7, when Brown surrendered possession, the rent due since April 30 was unpaid. In addition to the rent of $850 a year, it was provided in the lease that the lessee should pay "the taxes levied for the use of the city water." The lease contained a clause authorizing the lessor to enter and terminate the lease on non-performance of any of its covenants. The rent for the month of May was paid by Brown on June 8, 1899, the day after Elkind was put in possession; but the rent from June 1 to June 7, 1899, has not been paid by any one; as already stated, "in the fall of 1899" the plaintiff "tendered the defendant the sum of $17.63 as rent . . . from June 1 to June 7, 1899. . . . The bills for city water from the beginning of the term had never been paid by any one, but had been presented to Brown on the day of the sale to Elkind but never before by witness," nor, so far as appeared, by any one

else. There were other tenants in the building and but one water meter, and "it was impossible to tell how much water had been used by Brown except by estimation."

1. The defendant, in the first and second rulings requested by him, contended that unless there was a physical ouster or an eviction, the plaintiff's remedy is an action on the covenant for quiet enjoyment, and in his third request contended that "the non-occupation by Harford at any time, together with the actual surrender of the written lease" and of possession "constitute a surrender by operation of law."

It is settled that if one of two cotenants in possession ousts the other, he may maintain an action of trespass *quare clausum fregit; Silloway* v. *Brown*, 12 Allen, 30; *Bennett* v. *Clemence*, 6 Allen, 10, 18; *Byam* v. *Bickford*, 140 Mass. 31, 34; and the act of the defendant in putting Elkind in possession of the premises as sole tenant was an ouster within this rule.

The only question of difficulty in this case is whether the plaintiff was in legal contemplation in possession when the defendant gave possession to Elkind.

Under the arrangement by which Brown entered into the sole occupation of the store, the plaintiff's rights as a cotenant under the lease were to be kept alive. Unless there is something to the contrary, possession follows title, and Brown's possession was the possession of the plaintiff. The arrangement gave Brown the exclusive occupation of the premises so long as it lasted, but that did not in our opinion displace the legal possession which ensued from the continued existence of the plaintiff's title as cotenant under the lease. The actual surrender of the written lease by Brown did not affect the plaintiff's rights as one of the two to whom the premises were let. Brown's surrender of the possession of the premises was part of the transaction by which Elkind was put in possession and therefore the plaintiff was in possession when the defendant undertook to and did put Elkind in exclusive possession of the premises in which the plaintiff was the tenant of an undivided half interest. For these reasons, we are of opinion that the presiding judge was right in refusing to give the first, second and third rulings asked for.

2. In his fourth and fifth rulings the defendant contended that if the lessee was in arrears for water or for rent, it would

entitle the plaintiff to take possession rightfully without notice or demand.

Where, as in this case, there are several tenants and one meter, and no attempt has been made by the lessor to apportion the bill for water for the whole building, he cannot enter and terminate the lease for non-payment of water rates. The cases as to the apportionment of water rates in such a case are collected in *Stimson* v. *Crosby*, 180 Mass. 296.

As to the non-payment of rent, it is stated in the bill of exceptions that "Brown voluntarily gave up possession of the premises to the defendant," and after Elkind was put in possession Brown paid the rent for the month of May; the evidence did not warrant a finding that the defendant in fact entered for breach of covenant.

3. But we are of opinion that the sixth ruling requested by the defendant should have been given. Brown had the right to surrender his title as owner of one half of the term under the lease in question. The oral agreement by which Brown and the defendant agreed that the plaintiff should have the whole when he, Brown, "got through," did not enlarge the plaintiff's title. On Brown's surrendering to the defendant, all the right or title that the plaintiff had was that of a cotenant of an undivided half, the other undivided half interest having become merged in the fee by Brown's surrender. If the value of an undivided half interest was less than half the value of the whole, that fact was a fact which the defendant had the right to have the jury consider in assessing damages. As the presiding judge refused to submit that question to them, there must be a new trial upon the question of damages.

So ordered.

MARY F. FROST *vs.* CHARLES P. GEORGE.

Suffolk. November 19, 1901. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Mortgage, Of chattels. *Assignment. Estoppel.*

If an acknowledgment of satisfaction and discharge of a chattel mortgage signed by the mortgagee on the margin of the record in the city clerk's office is to be treated as an assignment of the title to the goods to the mortgagor, it does not become operative until brought to his knowledge. If it is to be treated as an acknowledgment of payment, it can only operate by way of estoppel after some one has acted on it. Therefore, if such an entry on the margin of the record is made by mistake by a mortgagee, he may revoke it at any time before it is known to the mortgagor, and may show in an action brought against him for taking the goods under his mortgage, that the debt secured by the mortgage was never paid, that the discharge on the margin was made by mistake, and that he cancelled it on the margin before the mortgagor learned of its existence.

A mortgagee under a chattel mortgage signed by mistake a discharge of it upon the record in the city clerk's office which he afterwards revoked before it was known to the mortgagor. Between the time of the writing of the discharge and its revocation the mortgagor had given to another a bill of sale of the mortgaged chattels stating them to be "subject to one mortgage", the only mortgage to which the property was subject being the one already named. In an action by the holder of the bill of sale against the mortgagee for taking possession of the chattels under his mortgage, the plaintiff offered to show that the mortgagor when he gave the bill of sale to the plaintiff told him that the mortgage on the chattels had been fully paid. In fact no part of it had been paid. The evidence was excluded. *Held*, that the exclusion was right. The offer was not to prove a statement that the mortgage had been discharged upon the record, and the mortgagor then did not know of the defendant's entry on the record, which afterwards was revoked before he heard of it, and it did not appear that the plaintiff took the transfer relying on the statement. The fact that the mortgagor told the plaintiff that the mortgage was paid when it was not was immaterial.

TORT for the alleged conversion of certain stock in trade and fixtures taken by the defendant under a mortgage made by one Samuel R. King, which the plaintiff alleged to have been paid and discharged. Writ in the Municipal Court of the City of Boston dated September 25, 1900.

On appeal to the Superior Court the case was tried before *Gaskill*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was argued at the bar in November, 1901, and afterwards was submitted on briefs to all the justices.

H. P. Harriman & J. F. Neal, for the plaintiff.

J. E. Hannigan, for the defendant.

LORING, J. This was an action of tort for the conversion of the stock and fixtures of a drug store in Woburn. The property originally belonged to one Samuel R. King, who mortgaged it to the defendant in December, 1899, and the mortgage was recorded both in Woburn and in Everett, where King had his residence. King also had mortgaged to the defendant the stock and fixtures of another drug store, the other drug store being situated in Everett, and that mortgage was also recorded in the city clerk's office of Everett. In the month of January, 1900, King paid the amount due on the mortgage on the fixtures in the other drug store, and on January 31, 1900, the defendant, intending to release that mortgage, by mistake made the following entry on the margin of the record of the mortgage in question in the city clerk's office of Everett:

"Everett, Mass., January 31, 1900. Having received satisfaction in full on the within mortgage, and the note thereby secured, the same are hereby cancelled and discharged. Charles P. George."

On March 1, 1900, King transferred the property by a bill of sale to the plaintiff "subject to one mortgage," and it is stated in the bill of exceptions that "the only mortgage to which the property was subject on March 1, 1900, is the one in question." In the following August the plaintiff removed "a portion of the goods in said store, . . . the goods covered by the mortgage being left in the store." Later in the month the defendant removed the property covered by the mortgage from the drug store, at the request of the owner of the store, and in September this action was brought against him for a conversion of that property.

At the trial the defendant was allowed to testify, against the plaintiff's objection, that the debt secured by the mortgage in question never had been paid; that the discharge on the margin of the record of it was made by mistake and was cancelled on the margin on March 15, 1900, that is to say, a fortnight after the property was transferred to the plaintiff.

Whether this so-called discharge in the margin of the record is to be treated as an assignment to the mortgagor of the personal property covered by the mortgage, or merely an acknowledgment of the payment of the mortgage debt, is not clear.

There is no authority in the statutes for discharging a chattel mortgage and transferring the interest of the mortgagee by an entry on the margin of the record of such a mortgage as there is in case of a mortgage of real estate; and there is no similarity between the two. In the case of real estate, the mortgage has to be recorded in the registry of deeds because a conveyance of real estate, to be valid against the world, must be by deed acknowledged and recorded, and on full performance of the condition of such a mortgage, whether before or after breach of condition, the mortgagor is entitled to a release of the mortgagee's interest in order that the record title to his land, free of the mortgage, shall be complete; Pub. Sts. c. 120, § 25; and by statute this release may be made by an acknowledgment of the satisfaction of the mortgage made in the margin of the record, and when so made it has the same effect as a release acknowledged and recorded in the registry of deeds. Pub. Sts. c. 120, § 24. The record of a mortgage of personal property, however, is an entirely different thing. A transfer of the title to personal property can be made by word of mouth, and when so made is valid as against all the world if possession is delivered to the transferee; and where the mortgagor does not wish to deliver to the mortgagee possession of the personal property mortgaged, the statute provides that the mortgage may be recorded in place of giving the mortgagee possession of the mortgaged personal property. Pub. Sts. c. 192, § 1.

When the mortgage of a chattel is recorded, it stands on the same basis as if the mortgagee had taken possession of the chattel mortgaged, except only in the matter of foreclosure. The statute provides that in foreclosing a chattel mortgage which has been recorded the notice of intention to foreclose must be recorded (Pub. Sts. c. 192, § 8), while the notice need not be recorded if the mortgage was valid without being recorded. *Taber* v. *Hamlin*, 97 Mass. 489. In case of a chattel mortgage, therefore, no release is necessary in case of performance, whether before or after the time appointed, to perfect the

title of the mortgagor. Pub. Sts. c. 192, § 6. *Weeks* v. *Baker*, 152 Mass. 20. The mortgagee's interest is transferred by agreement not in writing and not recorded, and the mortgagor's title is complete without any record of a release or discharge. For the difference between a mortgage of real estate and of personal property, see *Bigelow* v. *Smith*, 2 Allen, 264.

It is apparent, therefore, that an acknowledgment of payment of a chattel mortgage and a discharge of the same made in the margin of the record of the mortgage in the city clerk's office derives whatever effect it has from the principles of common law.

If the entry in question made on the margin of the record is to be construed to be an assignment of the title to the chattels covered by the mortgage to the mortgagor who was in possession, it was not operative until brought to the mortgagor's knowledge. In the case at bar there is no evidence that at the time it was made the discharge was known to the mortgagor. And we are of opinion that the offer to prove "that said Samuel R. King, at and prior to the conveyance to her of said drug store on March 1, 1900, the defendant not being present, informed Frank B. King, who then and there represented the plaintiff in the taking of said conveyance from said Samuel R. King, that the mortgage on said drug store in Woburn had been fully paid" was not an offer to prove that the plaintiff's agent had been told that this mortgage had been discharged. King's statement to the plaintiff did not purport to be in any way connected with the entry on the margin of the record of the mortgage, and did not purport to be a statement that there was such a record. If the entry is to be treated as a discharge, it was revoked before it was known to the mortgagor or his assignee.

If the entry is to be construed to be nothing more than an acknowledgment of payment, it could be revoked at any time before an estoppel was raised by some person acting on it. But not only was there no offer to prove that the plaintiff, the assignee of the mortgagor, knew of the entry, but there was no pretence that she parted with value relying upon it; so the defendant was not estopped from setting up that the acknowledgment was made by mistake when he erased it.

For the reasons already given, the plaintiff's offer to prove that King told the plaintiff's agent at the time of the transfer

that the mortgage was paid cannot affect the rights of the defendant. It does not appear that the plaintiff paid anything or that she took the transfer relying on this statement of King; all that appears is that she took a transfer of the property subject to one mortgage, namely, the mortgage in question. Under these circumstances, the fact that King told her this mortgage was paid, when it was not, was immaterial.

Exceptions overruled.

National Machine and Tool Company *vs.* Standard Shoe Machinery Company.

Suffolk. November 21, 1901. — May 19, 1902.

Present: Holmes, C. J., Knowlton, Morton, Lathrop, Barker, Hammond, & Loring, JJ.

Contract, Construction, Performance and breach. *Tender.*

An agreement by one owning a patent "to fully protect" a manufacturer making patented articles for him "from any suits on account of patents" does not call for a bond with a surety.

The plaintiff undertook to manufacture for the defendant certain parts of a patented machine the making of which involved considerable expenditure, on condition that the articles should be shipped as finished and the bills be settled promptly as they came to the defendant and that the defendant should arrange that the bills should be approved promptly and payments made on them at once so that the plaintiff might not have "too large an amount of money tied up on the work." The plaintiff, having finished one item on the defendant's order, sent a bill for $90 stamped "all claims for corrections in this bill must be made within ten days from date." Three or four days later the plaintiff asked for payment, complaining at the same time of another overdue account for nearly $700. The defendant's representative apologized and explained the delay as accidental. There were further complaints and explanations until the eleventh day, when the defendant's representative stated that the check was ready, but had been retained for entry as the bookkeeper was away. This afterwards turned out to be true, but on the twelfth day the check did not arrive, and the plaintiff gave notice, that the defendant having broken the contract he should stop all work under it, and did so. *Held*, that, although the defendant had not repudiated the contract, there might have been such a breach of it by an honest failure to pay as would warrant the plaintiff in a refusal to go on with the work; and that a finding was warranted, that the defendant's failure to pay the $90 promptly was a breach going to the root of the contract which justified the plaintiff in refusing further performance and resorting to his right of action. Holmes, C. J., & Loring, J. *doubting*, on the last point, in view of the smallness of the

sum, the indefiniteness of the terms of the contract as to the time for payment, the shortness of the delay, and some other circumstances.

An action of contract, with a count for work done by the plaintiff on the order of the defendant, was begun by attachment. When seeking to reduce the amount of the attachment, the defendant expressed a willingness to pay for all work that had been completed. The plaintiff's counsel stated what that work amounted to so far as he knew, whereupon the judge made an order dissolving the attachment, upon payment of that amount to the sheriff and the giving of a bond for $5,000 more. The defendant paid the sum named including an item for work done, which he afterwards disputed at the trial. *Held*, that the transaction was not a tender, and seemed to have been only a substitution of securities in the sheriff's hands, and left the correctness of the figures open to trial with the rest of the case.

A tender not pleaded or kept good by a deposit of the money does not prevent the recovery of interest and costs.

CONTRACT by a corporation manufacturing machinery, especially shoe machinery, against a corporation selling shoe machinery, with two counts for work done and for work and materials, and a third count for damages from the defendant's alleged breach of a contract under which the plaintiff agreed to manufacture for the defendant certain parts of a patented machine, called the Bay State Lock Stitch Machine, at prices amounting in all to $12,529.70. Writ dated May 31, 1900.

In the Superior Court the case was heard upon an auditor's report by *Mason*, C. J. The judge found for the plaintiff in the sum of $1,018.62, that being the sum found due by the auditor, with interest from the date of the writ.

The auditor found that the defendant did not repudiate the contract, and that the delay in payment did not justify the plaintiff in stopping work. The judge stated, that he adopted "the particular findings and rulings of the auditor, though the ruling that the defendant's delay of payment for finished work did not justify the plaintiff in declining to proceed with so much of the contract as remained executory is made with some hesitation."

The judge found specially that the provision of the contract for prompt payment of bills for finished work was material and important to the plaintiff and that such payment was not promptly made.

At the request of the parties, the judge reported the case for the determination of this court. If either of the rulings was wrong the finding was to be corrected or the case was to stand

for assessment of damages as might be necessary; otherwise, judgment was to be entered on the finding.

The case was argued at the bar in November, 1901, and afterwards was submitted on briefs to all the justices.

W. N. Buffum, for the plaintiff.

E. A. Whitman, (*R. Walcott* with him,) for the defendant.

HOLMES, C. J. This is an action of contract upon one or two small claims and for the breach of a contract made in March, 1900, by certain letters, in which the plaintiff undertook to manufacture certain portions of a patented machine, according to a schedule attached to the defendant's order. This last is the main source of trouble. With regard to payment the plaintiff wrote: "If you should favor us with an order for a considerable number of these parts, we would bill them up to you as they were finished, and would merely ask that the bills be settled promptly as they came to you." At a later stage of the negotiation the plaintiff wrote that it should expect the defendant "to arrange it so that the bills would be approved promptly, and payment made on same at once, so that we may expect payments coming in rapidly after we have got well started on the contract, thus preventing us from having too large an amount of money tied up in the work." In this letter the plaintiff also wrote that it expected the defendant "to fully protect us from any suits that might be brought against us while we are on this work, on account of patents." It is denied that this letter was a part of the contract. We see no sufficient reason for the denial.

About May 1, 1900, the plaintiff was sued and demanded a bond with surety, as protection under its agreement. The defendant agreed to give a bond but on May 21 declined to furnish a surety, and this is relied on by the plaintiff as one breach of the defendant's undertaking. We think it so plain that the defendant was not bound to give a surety that we dismiss this part of the case without further mention.

On May 17, 1900, the plaintiff having finished one item on the defendant's order, of sixty adjusting screws, sent a bill for the price, $90. The bill bore a stamped notice that "all claims for corrections in this bill must be made within ten days from date." It was understood by the plaintiff that if the bill was approved by the proper man it would be sent on to New York

to be paid. Three or four days later there was a conversation in the defendant's Boston office, it was suggested that this bill ought to be paid immediately on presentation and complaint was made with regard to another overdue account of nearly seven hundred dollars ($697.23). There were apologies and further delays, complaints and explanations, the defendant's representative always explaining the delay as accidental, and finally, on May 28, stating that the check was ready but had been retained for entry as the bookkeeper was away. This last seems to have been true. On May 29 the plaintiff, hearing that a check had not come on, notified the defendant that "as you have not lived up to your agreement with us in relation to the work we are doing for you, we shall stop all of your work to-day," and stopped. Later efforts to come to an understanding failed.

The plaintiff when it stopped work had finished another small item of $24, and on May 31 offered to deliver these goods as well as those for which the bill for $90 had been sent, but the defendant declined to receive them. May 31 was the date of the writ, and the plaintiff very candidly says that the offer was made after suit was brought. The plaintiff seeks to recover as damages for the defendant's alleged breach the cost of the finished parts, and also the value of stock and castings and a large amount of work upon parts never delivered or completed.

The case was sent to an auditor. He found that the defendant did not repudiate the contract, and that the delay in payment did not justify the plaintiff in stopping work. The judge of the Superior Court adopted his rulings and findings, although finding in addition that the provision for prompt payment of bills for finished work was material, and that payment was not made promptly, and expressing a doubt whether the plaintiff was not justified in refusing to proceed.

Although the contract was not repudiated by the defendant, we are of opinion, notwithstanding *Winchester* v. *Newton*, 2 Allen, 492, which perhaps was not intended to establish a different general rule, (see also *Newton* v. *Winchester*, 16 Gray, 208,) that there might have been such a breach by failure to pay, as, however honest and however little it expressed a repudiation, would warrant a refusal to go on with the work. *Bloomer* v. *Bernstein*, L. R. 9 C. P. 588. See *Stephenson* v. *Cady*, 117 Mass. 6. There

is nothing to the contrary in *Daley* v. *People's Building, Loan & Saving Association*, 178 Mass. 13, 18. What is said there refers to an attempt to avoid a contract *ab initio* for a refusal to pay money due upon an executed consideration, when to make that payment is all that remains to be done on that side.

We may say further that for the purposes of this decision it is not necessary to consider Lord Selborne's somewhat sweeping suggestion in *Mersey Steel & Iron Co.* v. *Naylor*, 9 App. Cas. 434, 439, that when delivery of an instalment of goods under an entire contract is to precede payment for the goods delivered, as payment cannot be a condition precedent of the entire contract, it cannot be a condition precedent to the deliveries remaining to be made, at least without express words. See *Norrington* v. *Wright*, 115 U. S. 188, 210. In this case both parties have assumed that the plaintiff could put the defendant in default without delivery merely by sending a bill for an item when it was finished, so that Lord Selborne's logical difficulty, if there is anything in it, does not apply.

The question before us therefore is whether the defendant's failure to pay $90 promptly was a breach going to the root of the contract, — a breach so important as to warrant the plaintiff in refusing to go on without defeating his own right to recover upon it or rescinding the contract. My brother Loring and I have not been able to reach a clear conviction that it was such a breach, in view of the smallness of the sum, the indefiniteness of the terms of the contract as to the time for payment, (see *Harnden* v. *Milwaukee Mechanics' Ins. Co.* 164 Mass. 382; *Parker* v. *Middlesex Mut. Ass. Co.* 179 Mass. 528, 531,) the shortness of the delay, and some other circumstances. Of course not every trifling breach of contract excuses the other side from further performance. *Honck* v. *Muller*, 7 Q. B. D. 92, 100. *Mersey Steel & Iron Co.* v. *Naylor*, 9 App. Cas. 434, 444. *Dubois* v. *Delaware & Hudson Canal Co.* 4 Wend. 285, 289. *Wright* v. *Haskell*, 45 Maine, 489, 492. *Weintz* v. *Hafner*, 78 Ill. 27, 29. *Worthington* v. *Gwin*, 119 Ala. 44, 54.

But my brethren are of opinion, and I dare say wisely, upon the findings, that the plaintiff was warranted in its course. The plaintiff's contract necessitated a considerable preliminary outlay, and would necessitate further expenditures in carrying out

its part. At the time it was paying nearly seventy dollars a day. Prompt payment for goods as finished took the place of payments on account. The plaintiff was sensitive, and had a right to be so, at any appearance of uncertainty as to the stipulated payments being made. It had a further ground of anxiety in the suits brought against it for infringement of patents, when it had only the defendant's personal guaranty to protect it. Under such circumstances, the failure to pay the other bill for nearly seven hundred dollars, gave a character to the failure to pay the smaller sum which was due, and imparted a significance to the delay that otherwise it might not have had. A failure to pay a small sum promptly because of difficulty in raising the money is not the same thing as, and may have a greater effect than, a similar failure simply because of the absence of a bookkeeper or of some misunderstanding between the defendant's Boston and New York houses.

The first count was upon a claim for $209.38 outside the contract thus far discussed. The auditor finds for the plaintiff, but for $129.15 only. The plaintiff demands the larger sum, notwithstanding the finding, on the ground that when seeking to reduce the plaintiff's attachment the defendant expressed a willingness to pay for all work that had been completed, that the plaintiff's counsel stated what that work amounted to so far as he knew, that thereupon the judge made an order dissolving the attachment upon the payment of that amount to the sheriff and the giving of a bond for $5,000 more, and that the defendant paid the sum, which included the item of $209.38. This transaction was not a tender and did not fall within the rule laid down in *Currier* v. *Jordan*, 117 Mass. 260, and *Bouvé* v. *Cottle*, 143 Mass. 310, 315. It would seem to have been only a substitution of securities in the sheriff's hands, and to have left the correctness of the figures open to trial with the rest of the case.

The second count also was for items outside the contract, and only one of them was disputed. This was for some articles not finished because the defendant, after the plaintiff refused to go on with its contract, took away jigs and tools which it had furnished the plaintiff under the contract, and also the unfinished articles. There is nothing in the report which necessarily implies that the failure to finish the articles was due to the plaintiff's fault,

or indeed to any other cause than the defendant's removal of them. Therefore we cannot say that the auditor's finding was wrong.

A part of the damages to be recovered by the plaintiff on the larger contract will be for work done under it. *Goodman* v. *Pocock*, 15 Q. B. 576, 580. Therefore one other question requires a few words. The defendant made a tender on May 31 of the amount then due, including the $90 claimed under the contract, which was refused. But this tender has not been pleaded or kept good, even if, as does not appear very clearly, it embraced the sums now recovered. Therefore it does not prevent the recovery of interest and costs. The answer was a general denial. *Brickett* v. *Wallace*, 98 Mass. 528, 529. *Grover* v. *Smith*, 165 Mass. 132. See *Noble* v. *Fagnant*, 162 Mass. 275, 286. The payment to the sheriff was not a payment into court or an admission that the sum paid was due, as we have said and as the plaintiff contends. In *Suffolk Bank* v. *Worcester Bank*, 5 Pick. 106, the amount tendered was deposited in a bank to the order of the plaintiff, and in *Goff* v. *Rehoboth*, 2 Cush. 475, the defendant was a town, and the treasurer might be presumed to have kept the money on hand in obedience to the order of the selectmen. In both the tender was set up and the money brought into court. See Pub. Sts. c. 168, § 23; *Town* v. *Trow*, 24 Pick. 168, 169; *Sanders* v. *Bryer*, 152 Mass. 141. There was another tender after suit brought, but that did not comply with Pub. Sts. c. 168, § 24, and is not relied upon.

Case to stand for assessment of damages.

DAVID CRAIG & another *vs.* JULIA B. FRENCH.

Suffolk. November 25, 1901. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

Practice, Civil. Contract, Implied.

A motion to recommit a case to an auditor is addressed to the discretion of the court, and an order granting or refusing it is not the subject of an exception or of an appeal.

By a contract in writing the plaintiff agreed to perform all the labor necessary for the erection of certain plumbing fixtures in the house of the defendant for a sum named, and to supply all the materials used at an advance of ten per cent over the cost of the stock. An auditor found that the plaintiff had performed the terms of the contract, but that most of the prices charged for the materials were excessive and not justified by the contract, and restated the account changing the prices as required by the evidence. The judge found the facts to be as stated by the auditor and found for the plaintiff. The defendant contended that the plaintiff could not recover on the contract, but only on a common count under which he must prove that his work benefited the defendant, and that he could recover only the increased market value of the defendant's house by reason of his work in accordance with the rule in *Gillis* v. *Cobe,* 177 Mass. 584. *Held,* that the rule in *Gillis* v. *Cobe* did not apply to the case, as the plaintiff had performed his contract.

CONTRACT, with one count on an account annexed for work and materials furnished for gas fittings, and another count on a contract in writing for doing certain plumbing work in the defendant's house and supplying the materials therefor. Writ in the Municipal Court of the City of Boston, dated November 10, 1896.

On appeal to the Superior Court the case was tried before *Mason,* C. J., without a jury, upon an auditor's report and oral testimony. The judge found the facts to be as stated in the auditor's report, and found for the plaintiffs in the sum of $1,511.38. The defendant alleged exceptions.

H. Dunham, for the defendant.

R. Cushman & C. T. Cottrell, for the plaintiffs.

LATHROP, J. This is an action of contract. The declaration contains two counts. The first count is upon an account annexed for work and materials furnished by the plaintiffs to the defendant, and embraces charges for labor and for gas fittings furnished for and put into the defendant's house on Beacon Street, upon

an oral agreement by which the plaintiffs were to charge a fair and reasonable amount for the same. The second count is upon a contract in writing, by the terms of which the plaintiffs agreed for $275 to perform all the labor necessary for the erection of certain plumbing fixtures in the same house, and to supply all the material used at an advance of ten per cent over the cost of the stock. The contract concluded with these words: "We hereby agree to do all the plumbing work above the basement by October 1st, provided owner gives all assistance desired by us to forward the work. We agree to have the work in the basement completed ten days later." Annexed to this count was a bill of particulars. The plaintiffs also declared for certain additional labor and materials not included in the contract.

The case was sent to an auditor, who found that the plaintiffs furnished the labor and materials set forth in the first count, that the prices therein charged as to almost every item were fair and reasonable; and that he had restated the account, changing the prices charged as required by the evidence.

As to the second count, the auditor found that the charges for labor and the quantity of plumbing material furnished were set forth with substantial accuracy, but that in most instances the prices charged for the material were excessive, and not justified by the contract. He therefore restated this account.

The auditor also found for the plaintiffs for additional labor and material not included in the contract.

Various defences were set up, which were disposed of by the auditor in favor of the plaintiffs. He also found that the plaintiffs had in substance carried out the terms of their contract with the defendant.

At the trial in the Superior Court the defendant asked that the report should be recommitted to the auditor; and took an appeal from the refusal of the judge to grant the motion.

Much evidence was introduced by the defendant at the trial, and is set forth in the bill of exceptions; but the judge ruled that the auditor's report was prima facie evidence upon the questions of fact, and that upon the points wherein the report was attacked it remained evidence to be weighed with the other evidence. He also found the facts to be as stated in the auditor's report; and found for the plaintiffs.

The questions of law which arise in the case are as to the refusal to recommit to the auditor, and also to the refusal to give certain requests for rulings, which are before us on exceptions.

1. The appeal may be briefly disposed of. A motion to recommit a case to an auditor is addressed to the discretion of the court, and is not the subject of an exception or of an appeal. *Kendall* v. *Weaver*, 1 Allen, 277. *Packard* v. *Reynolds*, 100 Mass. 153. *Butterworth* v. *Western Assurance Co.* 132 Mass. 489. *Carew* v. *Stubbs*, 161 Mass. 294.

2. The first request for instructions, which was refused, was: "On the evidence the plaintiff cannot recover on the second count in the declaration." The defendant relies upon the case of *Gillis* v. *Cobe*, 177 Mass. 584. But we are of opinion that the case cited has no application to the case before us. In that case the plaintiffs had not performed the terms of their contract, and the question was what they were entitled to recover on a *quantum meruit*. In the case before us it has been found that the plaintiffs performed their contract, and they seek to recover on the contract and not on a *quantum meruit*. The contract fixed the price of the labor, and stated the method of arriving at the price to be paid for materials, namely, the cost and ten per cent in addition. These sums the plaintiffs were entitled to receive under the contract. What the value was to the defendant was entirely immaterial.

We do not understand from the brief of the defendant that any other question of law raised at the trial is insisted upon. The principal part of the brief is devoted to arguing questions of fact, which are not before us.

Exceptions overruled; appeal dismissed.

INEZ A. WARE *vs.* EVANGELICAL BAPTIST BENEVOLENT AND MISSIONARY SOCIETY OF BOSTON.

Norfolk. December 5, 1901. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Nuisance.

There is no fault in erecting and maintaining a business building with a corridor about five inches lower than the floors of the rooms opening upon it.

Semble, that a woman who has passed from the corridor of an office building into one of the rooms opening from it, the floor of which is about five inches higher than the corridor, without stumbling, is not in the exercise of due care if when coming out of the same doorway she falls on account of the difference in level of the floors.

TORT for injuries from a fall caused by the plaintiff stepping from the floor of a room of the Tremont Temple Building in Boston, used for the exhibition and sale of certain pictures, to the adjoining corridor alleged negligently to be constructed and maintained by the defendant four and seven eighths inches lower than the floors of the rooms opening upon it. Writ dated December 15, 1899.

At the trial in the Superior Court before *Sherman*, J., the jury, to whom the case was submitted by agreement, returned a verdict for the plaintiff in the sum of $2,500; and the judge reported the case for the consideration of this court in the manner and upon the terms stated by the court.

T. W. Proctor, for the defendant.

F. H. Williams, for the plaintiff.

MORTON, J. This is an action of tort to recover for personal injuries sustained by the plaintiff through the alleged negligence of the defendant. At the conclusion of the plaintiff's evidence, the defendant asked the judge to rule that the plaintiff could not recover, and to direct a verdict for the defendant. The judge did not rule as thus requested, though expressing the opinion that the action could not be maintained. But, it was agreed instead by the parties after conference with the judge, that the case should be submitted to the jury, and if the jury returned a verdict for the plaintiff the case should be reported

to the Supreme Judicial Court, and if that court was of opinion that a verdict ought to have been directed for the defendant judgment was to be so entered. The jury returned a verdict for the plaintiff and the case is here as thus stipulated.

The injury complained of was due to a fall received by the plaintiff while passing from one of the rooms in the Tremont Temple Building so called in Boston, belonging to the defendant, to the hallway or corridor on which the room opened. The floor of the room was four and seven eighths inches above the floor of the hallway and it was this difference in height which caused the plaintiff, as she stepped forward out of the room, to fall. She had entered the room a few minutes before through the same door. She had never been in the building previously if that is material. It is contended that this construction was defective, and this is the negligence alleged.

It is matter of common observation that in entering and leaving stores, halls, railway car stations and platforms, office buildings, and other buildings and places and private houses, adjoining surfaces are frequently at different levels, and the difference in level has to be overcome by one or more steps of greater or less height or by some other device. The same thing happens in the interior of buildings and structures. We cannot think that such a construction is of itself defective or negligent. There is nothing in the nature of things which requires that the floor of a room which is entered from a hall or corridor, especially in a building like the Tremont Temple Building, should be on the same level as that of the hall or corridor. Such may be the more usual and common construction, but there is nothing, we think, which requires it to be so at the peril of being regarded as defective or negligent, if it is not, and if suitable safeguards are not adopted to warn and protect those invited there. Moreover, the plaintiff had gone into the room, without stumbling, over the same step where she fell when coming out. It would seem that the accident was due, to say the least, quite as much to her own inattention as to the presence of the step. It may be as the plaintiff contends, though we do not mean to make any intimation to that effect, that if the accident was due to a defect in the original construction or plan of the building, the defendant would be liable, notwithstanding it had leased

that part of the building to the Tremont Temple Baptist Church, but it is not necessary in the view which we have taken of the question whether there was a defect, to consider that matter since we are of opinion as already observed that the construction cannot be regarded as defective or negligent.

The result is that, according to the report, judgment is to be entered for the defendant.

So ordered.

JULIA McLEAN, administratrix, *vs.* GEORGE F. D. PAINE & others.

Suffolk. December 5, 1901. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Negligence, Employer's liability, defective machine, assumption of risk, plaintiff's due care. *Witness. Practice, Civil*, Conduct of trial. *Discretion of Court.*

In an action by an employee of the defendant, injured while operating a circular saw by the machine throwing a piece of board against him, there was evidence tending to show, that the machine "wobbled" and that the accident was caused by the wobbling, that the saw might have been sprung or that it might have been set improperly on the arbor or the arbor set improperly in the boxes or the boxes so worn that the saw would not run smoothly, and that these things could have been discerned by proper care on the part of the defendant, also that the man whose duty it was to set the saw and who did set it admitted on cross-examination that "he did not pay any particular attention in order to ascertain whether the saw was true and in perfect running order." *Held*, that this warranted a finding that the defendant was negligent in regard to keeping the machine in proper condition.

In an action by an employee of the defendant, injured while operating a circular saw by the machine throwing a piece of board against him, there was evidence tending to show, that the plaintiff put the board in the saw as he always had put it in and that the saw "kicked and threw it back at him", and there was nothing to show that he knew or by the exercise of reasonable care ought to have known that the saw was out of order or that he did not possess ordinary skill. *Held*, that this warranted a finding that the plaintiff was in the exercise of due care and that he did not assume the risk of such an accident.

A witness called by a defendant was cross-examined in regard to conversations with a certain witness for the plaintiff, and stated fully all the conversations. He then was asked if he made certain specific statements to the plaintiff's witness, which he denied. The plaintiff's witness then testified in rebuttal that the defendant's witness had made to her the statements which he denied making. Thereupon the defendant's witness was recalled and was asked to state what conversations he had had with the plaintiff's witness. This on objection was

excluded. *Held*, that the exclusion was no ground for exception; that, whether the witness should be allowed on surrebuttal to testify again to conversations already given, was a matter within the discretion of the presiding judge as to the conduct of the trial.

TORT under St. 1887, c. 270, for injuries sustained by the plaintiff's intestate while in the employ of the defendants from being struck in the abdomen by a piece of board thrown against him by a circular saw which he was operating, causing him to suffer and in two days to die. Writ dated April 10, 1894.

At the trial in the Superior Court before *Fox*, J., the jury returned a verdict for the plaintiff and assessed the damages for suffering in the sum of $1,000 and for death in the sum of $3,000. The defendants alleged exceptions.

T. W. Proctor, for the defendants.

H. N. Collison & W. E. Collins, for the plaintiff.

MORTON, J. This is an action of tort to recover for personal injuries sustained by the plaintiff's intestate while in the defendants' employment and from which he died two days after. There was a verdict for the plaintiff and the case is here on exceptions by the defendants to the exclusion of certain testimony and to the refusal of the presiding judge to give certain rulings that were asked for. Apart from the question of evidence, the case has been argued by the defendants on the footing that the questions are, whether the plaintiff was in the exercise of due care, whether there was any evidence of negligence on the part of the defendants, and whether the plaintiff assumed the risk, and we shall so treat it.

It seems to us that there was evidence of negligence on the part of the defendants. There was testimony tending to show that the saw "wobbled", and that the accident was caused by this "wobbling." It is true that there was also evidence tending to show that the accident was caused by the carelessness of the plaintiff's intestate in dropping a piece of wood on to the saw; but it was for the jury to say how the accident happened. It cannot be said, we think, that there was no evidence justifying the conclusion that it was caused by the "wobbling" of the saw. We also think that there was evidence tending to show that the "wobbling" of the saw was due to carelessness on the part of the defendants. There was testimony tending to show

that the saw might have been sprung, or that it might have been improperly set on the arbor, or the arbor improperly set in the boxes or the boxes so worn that the saw would not run smoothly and that these things could have been discovered by proper care on the part of the defendants. And there was an admission, on cross-examination, by the man, whose duty it was to put on the saw, and who did put it on, that "he did not pay any particular attention in order to ascertain whether the saw was true and in perfect running order." This clearly warranted a finding, that the defendants did not exercise proper care in seeing that the saw ran as it should run.

There was evidence warranting a finding, we think, that the plaintiff's intestate was in the exercise of due care and that he did not assume the risk. The testimony tended to show that he "put the lumber in the saw as I [he] always put it in", and that the saw kicked and threw it back at him. There was nothing to show that he knew or in the exercise of reasonable care ought to have known that the saw was out of order, or that he did not possess ordinary skill. It could not be held therefore that he assumed the risk, or was not in the exercise of due care.

The remaining question relates to the matter of evidence. One Buffum called as a witness by the defendants was asked on cross-examination in regard to conversations with one Margaret McLean. As we interpret the bill of exceptions, he stated fully all the conversations that he had had with her, and then was asked if he had not made certain specific statements to her which he denied. Miss McLean was called in rebuttal and was allowed to testify that Buffum had made the statements which he denied. This was the extent of the rebuttal. Thereupon Buffum was recalled by the defendants and was asked to state what conversations he had had with Miss McLean. This was objected to and was excluded. He was allowed to contradict the specific statements testified to by her. We think that the ruling was right. At the stage of the case at which the question was put, it was clearly, we think, within the discretion of the presiding judge to admit or exclude it. *Howes* v. *Colburn*, 165 Mass. 385, 388. The case is clearly distinguishable from *Mullins* v. *Peaslee*, 180 Mass. 161, on which the plaintiff relies. If

the plaintiff on calling Miss McLean in rebuttal had been limited to the specific questions finally asked Buffum on cross-examination the case presented would have been exactly parallel to that. But this case is entirely different. Buffum testified fully on cross-examination to the conversations with Miss McLean and if there was anything that the defendants had desired to bring out more fully or to correct they could have asked Buffum about it, when the cross-examination was concluded. To have allowed him to testify on surrebuttal would have been to permit him to testify again to conversations which he had already given, and which there had been full opportunity to direct his attention to in case there had been any omissions or corrections which the defendants desired to have supplied or made. Whether he should be allowed to do so, was, it seems to us, plainly within the discretion of the presiding judge as to the conduct of the trial.

Exceptions overruled.

WILLIAM GILCHRIST *vs.* CHARLES COWLEY & another, executors.

Middlesex. March 11, 1902. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Practice, Civil, Entering judgment, Continuance. *Trustee Process.*

A case in the Superior Court in which a judge has made a finding for the plaintiff, assessing damages, is not ripe for judgment while a motion for a continuance is pending on the ground that the defendant has been summoned as trustee of the plaintiff in another action.

CONTRACT against the executors under the will of Margaret Court of Lowell, for a legacy of $500. Writ in the Police Court of Lowell dated July 13, 1901.

On appeal to the Superior Court the case was tried before *Braley,* J., who found for the plaintiff, and assessed damages in the sum of $583.75. The case came to this court on an appeal by the plaintiff from an order of the Superior Court denying a motion for entry of judgment under the circumstances stated by the court.

E. F. McClennen, for the plaintiff.

C. Cowley, for the defendants.

J. S. Patton, for Jeanie Morton, petitioning creditor.

HOLMES, C. J. This is an action for a legacy. On November 26, 1901, the defendants filed a motion for a continuance, on the ground that they had been trusteed by a creditor of the principal plaintiff, in a suit begun after the present action. On November 30, 1901, a judge of the Superior Court filed a finding for the plaintiff, assessing the damages. On January 31, 1902, a motion was filed that the clerk be directed to complete the record by entering judgment for the plaintiff as of the first Monday of January. This was denied on February 12, and a petition for a continuance, filed on the same day by the above-mentioned creditor, was allowed. The plaintiff appeals.

As has been pointed out more than once, "on appeal the record does not show the ground on which the plaintiff's motion was denied." *Giles* v. *Royal Ins. Co.* 179 Mass. 261. But the plaintiff argues that the case was ripe for judgment when the finding was filed, that thereupon he had a right to judgment on the first Monday of January under Rule 25 and the Standing Orders of the Superior Court, and that therefore the power of a single judge to grant a continuance thereafter was gone. If this argument escapes the difficulty just stated and has no others of its own, still a sufficient answer is that it fails in its premise that the case was ripe for judgment.

The plaintiff relies upon *Dunbar* v. *Baker*, 104 Mass. 211, and *Dalton-Ingersoll Co.* v. *Fiske*, 175 Mass. 15, for the proposition that a case is ripe for judgment notwithstanding a motion for a continuance. It hardly is necessary to say that neither of those cases decides that proposition. The latter decides that the benefit of such a motion is lost by suffering a default. The former, that after a default a case is no less ripe for judgment that the defaulted party simply files such a motion among the papers in the case without getting his default taken off or calling the motion to the attention of the court. The general rule is recognized or not denied in *Dalton-Ingersoll Co.* v. *Fiske*, although the application of it in *Hosmer* v. *Hoitt*, 161 Mass. 173, is criticised.

The finding by the court did not import an overruling of the

motion for a continuance. By Pub. Sts. c. 183, § 40, it is provided expressly that in cases like this the action may proceed so far as to ascertain what sum is due from the defendant. Therefore, whether the defendant's motion was well founded, or whether the only effective one was that filed by the creditor in pursuance of the same section after the first Monday in January, the time when it was necessary to deal with the former had not arrived and the finding did not affect it. *Creed* v. *Creed*, 161 Mass. 107.

The record discloses no ground for saying that the continuance granted by the Superior Court was not justified.

Orders affirmed.

MICHAEL C. HAYES *vs.* GEORGE G. TIDSBURY.

Middlesex. March 11, 1902. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Evidence, Competency, to show possession of personal property. *Replevin.*

Semble, that to show that a person is the tenant and actual occupant of a building is evidence that he is in possession of chattels in use in the building.

In an action of replevin against a deputy sheriff for attaching goods on certain premises, there was only one witness and only by picking out particular expressions used by him and depriving them of their context or the reasonable explanations by which they were followed could even the form of a case be made out, to show that the plaintiff was the tenant of the premises and in consequence in possession of the goods when attached. *Held*, that the evidence was not sufficient to submit to the jury.

HOLMES, C. J. This is an action of replevin of chattels held by the defendant, a deputy sheriff, under attachments made on November 4, 1899, in actions against the Bay State Manufacturing Company. At the close of the plaintiff's evidence the presiding judge directed a verdict for the defendant and the plaintiff excepted. The only question before us is whether there was any evidence of the plaintiff's right. No evidence was given of a title on his part, and the question therefore, put in the way most favorable for the plaintiff, takes the form whether there was evidence of his possession. *Odd Fellows Hall Association* v.

McAllister, 153 Mass. 292, 295. And we assume for the purposes of decision that the evidence would be sufficient if he was tenant and actual occupant of the building in which the property was in use. *Ibid.* *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44.

There is no doubt that the evidence, if any, was extremely slender. The plaintiff did not appear, although summoned by the defendant, and the judge may have thought the excuse a pretence. There was but one witness called, the owner of the building. He admitted having been annoyed by the proceedings in which the plaintiff had a part, but gave no indication of a want of candor or of an intent to pervert the truth. He said that he had signed a receipt for rent for the month of October, running to the plaintiff, but explained that this was after the attachment and that up to that time he had made no lease to the plaintiff, and that he refused to do so. So in answer to a question put by the plaintiff's counsel as to whether there were any other than Mr. Hayes's workmen about the building, he said not that he knew of, but again explained later that he did not know whose servants the people were or know anything about it, except the names of the persons whom he saw. He gave the names, so that it was simple for the plaintiff to prove that the persons were his servants if they were. In short, it would be only by picking out particular expressions and depriving them of their context or the reasonable explanations by which they were followed, that even the form of a case could be made out. The presiding justice saw the witness and could judge better than we can from the print, whether there were two views of his evidence possible. We are not prepared to say that he was wrong.

Exceptions overruled.

J. W. Keith, for the plaintiff, submitted a brief.

C. F. Choate, Jr., for the defendant.

BRIDGET SULLIVAN, administratrix, *vs.* BOSTON ELECTRIC LIGHT COMPANY.

Suffolk. March 11, 1902. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Negligence, In building in process of construction. *Practice, Civil*, Order of trial, Exceptions.

In an action under St. 1898, c. 565, for the death of the plaintiff's intestate caused by the falling of the roof of an engine room, owned and to be operated by the defendant and then in process of construction, it appeared, that the roof consisted of steel trusses then partly covered with terra cotta, that these trusses rested on steel columns, that the columns gave way, bending inward and causing the accident, that the columns were to have been enclosed in brick work, but that this only partly had been done, so that the brick wall was about ten feet short of two steel runway girders one on each side of the room, supporting a steel crane with a movable hoist which extended from one side of the room to the other, that the crane was worked by electricity, lifted fifteen tons, and itself weighed forty-eight tons, that it was furnished by the same contractor that made the steel work of the roof, that the crane was to be ready for use before the completion of the building, and that one of the uses to be made of it was in hoisting and moving various heavy articles needed to complete and equip the building, that the steel work was done, except some connecting pieces that could not be put in until the brick work was more complete, that the plaintiff's intestate was at work in the employ of a contractor doing the mason work, that the crane was not under the control of the plaintiff's employer and its operator was not in his employ. There was evidence that the crane was used to move stones for the engine foundations not a part of the work of that contractor, and in moving machinery and steam pipes not shown to be covered by any contract with an independent contractor, and the defendant offered no explanation as to how it happened that the crane which it had caused to be placed in position was used for these various purposes. *Held*, that the jury were warranted in finding that the accident was due in part to the operation of the crane before the steel work had been strengthened by the brick wall, that the crane was so operated by the defendant, and that this was negligence.

An action under St. 1898, c. 565, for the death of the plaintiff's intestate caused by the falling of the roof of an engine room, owned and to be operated by the defendant and then in process of construction, was tried at the same time with an action by the same plaintiff for the same death against the steel company which made the steel trusses of the roof that fell and also made the steel columns that failed to support the trusses. At the close of the plaintiff's evidence, the defendant owner elected to rest on the plaintiff's case and put in no evidence. The judge refused to order a verdict for the defendant owner, and also refused to allow him to go to the jury immediately and before the defendant steel company had put in its evidence in the other case, and the steel company proceeded to introduce evidence tending to show that it was not liable and to cast the liability on the owner. At the conclusion of the evidence, the argu-

ments in both cases were made, and the judge submitted both cases to the jury, instructing them, that as against the defendant owner they could consider no evidence introduced after he rested his case. The jury found against the defendant owner. *Held*, that, the questions, whether the cases should be tried together, and at what stage of the trial the case of the resting defendant should be submitted to the jury, were within the discretion of the presiding judge, and that, if the defendant owner was prejudiced, his only remedy was by a motion for a new trial.

Where two cases were tried together and the judge left it to the jury to say whether certain plans had been introduced against both of the defendants or only against one of them, when probably he ought to have decided that question for himself, this will not sustain an exception, if it nowhere appears that the plans contained anything prejudicial to the objecting defendant.

TORT under St. 1898, c. 565, for the death of the plaintiff's husband and intestate caused by the falling of the roof of a power house of the defendant, at the corner of L Street and East First Street in that part of Boston called South Boston, while the intestate was working there in the employ of Whidden and Company, independent contractors for the mason work of the power house. Writ dated October 11, 1898.

In the Superior Court before *Richardson*, J., the case, in accordance with a previous order, was tried at the same time with another case by the same plaintiff against the Pennsylvania Steel Company, contractor for the steel work of the roof, in which it was sought to make that company liable for the death of the intestate. At the time of the accident, the plaintiff was working in a trench in that part of the building which when completed was to be used as the engine room. The crane afterwards mentioned was furnished by the Pennsylvania Steel Company under a contract with the defendant.

All the steel in this building and roof which had been furnished or erected before the accident was furnished and erected by the Pennsylvania Steel Company under the provisions of its contract with the defendant. The furnishing and erecting of the electric crane, so far as it had been done, was done by the Pennsylvania Steel Company, under the same contract. All the brick work and mason work which had up to that time been furnished and erected had been so furnished and erected by Whidden and Company under a separate and independent contract with the defendant, whereby the brick walls were to be built by them at a fixed price per cubic foot, and the other mason work

connected with the building was to be done at fixed prices. The terra cotta tiling and covering of the roof (outside of the steel framework of the roof), so far as they had been made or put on at the time of the accident, were made and put on by one McIntosh.

The building in question, which was in process of construction upon the land of the defendant, was nearly square, and, when completed, would have consisted of a steel framework, brick walls, and a roof composed of a framework of steel trusses connected by steel purlines. Upon these purlines the terra cotta tiling and the roof covering were to be set and held in place. The building was designed to be divided into two portions, an engine room and a boiler room, with a subdivision of the latter for use as a coal pocket. The engine room was about two hundred and forty feet long by eighty feet wide, and from sixty to sixty-five feet in height. The boiler room, including the coal pocket, was practically of the same size as the engine room, making the entire structure about two hundred and forty feet long by about one hundred and sixty feet in width, and from sixty to sixty-five feet in height. The roofers began their work near the centre of the roof framework, or skeleton, and at the time of the accident, July 29, 1898, had covered at least one half of it.

At the time of the accident part of the roof, consisting of six or seven trusses over the engine room at the easterly or water end of the building, with whatever tiling or roofing material had been placed thereon, fell to the ground. These trusses were supported by steel columns, and fell when the columns gave way. The three columns supporting the three trusses nearest the easterly or water end of the building "buckled" or bent over and fell inward pointing toward the fourth column, and so did the three columns supporting the three trusses to the west of the fourth truss.

Each of the steel trusses of the roof of the engine room was supported at each end by, and rested upon, a steel column, the trusses over the engine room being supported at one end by a row of steel columns on the L Street side of the building, and at the other end by a row of steel columns which divided the engine room from the boiler room, the rows of steel columns running parallel with each other. These columns and trusses had

been in position for three or four weeks before the accident, and all the purlines connecting the trusses with each other had been attached and erected in place, except the purlines which were to be connected with the wall at the easterly or water end of the building when the wall should have reached the height of the trusses. This set or bay of purlines had not been erected in place or attached at the time of the accident, and were a part of the steel work contracted for to be furnished and erected by the Pennsylvania Steel Company under the contract mentioned. This set or bay of purlines was to fit into the wall of masonry at the easterly or water end of the building, and there were no steel columns in that wall. The purlines could not be attached until the wall was up. At the date of the accident that easterly wall was from eighteen to twenty-five feet in height, or about twenty-five feet below the crane girder.

After the erection of the steel columns, Whidden and Company, contractors for the brick work, began to build the walls outside of and surrounding these steel columns, and at the time of the accident, the L Street or northerly wall had been built from thirty-five or forty feet high or to within nine or ten feet of the crane runway girder hereafter described, which was from about forty-five to fifty feet from the ground, except that in the last three bays or spaces between the columns at the easterly or water end of the building, the wall was lower, tapering off to a minimum height of about twenty-five feet from the ground. Part of the centre wall, or that dividing the engine room from the boiler room, had been built to a height about five feet above the crane runway girder, and the remainder of the wall had been built to the height of the runway girder, except that in the last three bays or spaces between the columns on the easterly end of the building it was lower, tapering off toward the easterly or water end to a minimum height of about twenty-five feet. The wall of the easterly or water end had been built to about eighteen to twenty-five feet in height, and that at the westerly end of the building had reached about thirty feet in height. The purlines on the most easterly bay were designed to rest one end on top of the easterly wall, when completed, and the other end on the first truss, there being no truss on top of the easterly wall.

In the engine room there were two crane runway girders, one

on each side of the room resting on and fastened to a shoulder of the steel columns. These girders ran the entire length of the engine room and were from about forty-five to fifty feet from the ground. Upon the top of these runway girders there was a rail or track upon which to run an electric crane. This crane extended from side to side, spanning the engine room, one end resting upon the girder on the L Street side, and the other resting upon the girder on the columns dividing the engine room from the boiler room. Upon the top of this crane there was a movable hoist which ran on the top of the crane from one side of the engine room to the other, the crane itself moving from one end of the engine room to the other. The whole apparatus was operated by electricity and was put in for hoisting purposes. The crane lifted fifteen tons and was designed to lift and carry weights of from one to twenty-five tons. The crane itself weighed forty-eight tons. It was built and furnished by the Morgan Engineering Company under a sub-contract of that company with the Pennsylvania Steel Company.

It appeared, that the crane had been operated for moving or hoisting foundation stones, machinery, big steam pipes, flagging and things connected with the engine at times between July 18 and 26, 1898, but it did not appear under whose direction or control it was operated on any of these occasions unless it could be inferred from the evidence stated. It did appear, however, that the crane was in no way under the control of Whidden, and that the operator of the crane was not in the employ of Whidden.

While the building was in the above described condition, on July 29, 1898, at or about six o'clock in the afternoon, a part of the roof, consisting of six or seven trusses over the engine room, collapsed and fell with a crash into the interior of the engine room, killing the plaintiff's intestate.*

At the close of the plaintiff's case, the defendant asked the judge to direct a verdict for the defendant upon the plaintiff's case, and, upon the judge's statement that the motion would not be considered at that stage unless the defendant also rested its case, the defendant elected to rest and did rest, and introduced no evidence in its own behalf, and thereupon requested the judge

* For a further description of the same building at a time later than the accident in this case, see *Melvin* v. *Pennsylvania Steel Co.* 180 Mass. 196.

to rule that upon all the evidence the plaintiff could not recover. The defendant further requested the judge to rule that, in case the judge should rule that the plaintiff was entitled to go to the jury, the defendant had the right to have the case presented to the jury immediately and before the introduction of any evidence for the defence in the other case, against the Pennsylvania Steel Company, in which the counsel for the defendant did not elect to rest his case upon the conclusion of the plaintiff's case.

The judge refused to make either of the rulings so requested, and ruled that the case should be submitted to the jury. The judge did not allow the defendant to argue the case to the jury upon the evidence as it then stood at the conclusion of the plaintiff's case, but having refused the requests to rule, allowed the case against the Pennsylvania Steel Company to proceed before the same jury and allowed the Pennsylvania Steel Company, the defendant in the other case, before argument by the defendant in this case, to put in the defence of the steel company, wherein testimony was introduced on behalf of the steel company, without cross-examination on the part of the defendant in this case, which tended, or was contended to tend, to relieve the steel company from liability and to cast the liability upon the defendant in this case. As to the evidence so introduced by the steel company, the judge expressly charged the jury to disregard the evidence introduced on behalf of the steel company after the plaintiff and defendant had rested in the case at bar, and instructed them that the liability of the defendant in the case at bar should be determined by the state of evidence as it existed when the plaintiff and defendant rested in the case at bar.

After the closing of the plaintiff's case in the case at bar, the counsel for the defendant remained in attendance, awaiting an opportunity to make his final argument before the jury in behalf of the defendant, but took no part in the examination of witnesses.

Upon the conclusion of both cases, they were submitted to the jury at the same time, the presiding judge instructing the jury that they were to consider as evidence against the defendant in this case only such evidence as had been introduced

before it rested and only such evidence as was in the case at the conclusion of the plaintiff's case against this defendant. The jury, however, heard the entire evidence presented by the steel company in its case, which consumed nearly an entire day after the defendant had rested in the case at bar. The defendant excepted to the order of the judge allowing this method of procedure by which evidence in another case against a different defendant was heard by the same jury before the final argument for the defendant in the case at bar.

The defendant requested the judge to make the following rulings, which were given or refused as indicated:

1. Upon all the evidence in this case the plaintiff is not entitled to recover against this defendant. [Refused.]

2. In deciding the case of the Boston Electric Light Company, the jury must decide it upon the evidence in that case, as it stood at the time both the parties to it rested. All evidence afterwards introduced in the case of the Pennsylvania Steel Company must be wholly disregarded in the decision of the case against the electric light company. [Given.]

3. The plans which were put in evidence at the time the contract between the two defendants was offered were admitted as evidence in the case against the steel company only. Not having been admitted as against the electric light company, they must be wholly disregarded in the decision of the case against the latter company. [Refused, and substitute given.]

4. If the building which fell was being constructed by different contractors for the electric light company and not by the company itself, and the work of the contractors was not finished and the building was not completed when the accident occurred, the electric light company is not liable. [Given with a modification.]

5. Upon the evidence in this case, the building was being erected by independent contractors, for whose negligence the electric light company is not liable. [Refused.]

6. The building not being completed at the time of the accident, and there being no evidence in this case that it had been turned over to and accepted by the electric light company, the fall of the roof is not in itself evidence of negligence on the part of the electric light company. [Given in substance.]

7. Under the circumstances stated in the last ruling (6), the fall of the roof was in itself evidence of negligence on the part of the contractor for the steel work. [Refused.]

8. The mere fact that the electric light company had an engineer or architect on the ground for the purpose of overseeing the work in its behalf, and seeing that the contractors did their work according to the contracts, would not make the electric light company liable in this case or relieve any contractor from liability. [Given with a supplement.]

9. Upon the evidence, the employment of Mr. Ball [the engineer of the defendant] and the duties performed by him are not such as to make the electric light company liable and to relieve any contractor from liability. [Refused, and substitute given.]

10. The burden of proof is upon the plaintiff to prove, and not upon the electric light company to disprove, the material elements of the case, including:

(1) That the building had been completed, or so far completed as to enable the contractors to turn it over to the electric light company, and had been accepted by and taken into the custody and control of the latter. [Given.]

(2) That Mr. Ball's employment, position and relation to the work were such that they relieved the contractors of liability and shifted the responsibility for the building upon the electric light company. [Refused.]

(3) That the fall of the roof was occasioned by any act or default of the electric light company. If the jury are in doubt as to what caused the roof to fall, or as to whether it fell through any act or neglect of the electric light company, a verdict cannot be rendered against the latter. [Given.]

11. There is no evidence that the steel work contracted for by the Pennsylvania Steel Company had in fact been fully completed or had been accepted by this defendant. [Refused, but later given in substance in answers to suggestions of counsel at the close of the judge's charge, the judge then stating that the purlines had not been put up at the east end of the building where the wall was not high enough to set them.]

12. If such steel work had just been completed and had been turned over to this defendant, and the roof fell because of hidden

defects in the material or of the use of defective materials by the steel company, or of defective or negligent construction, the defendant would not be liable. [Given.]

As to the third request, the judge instructed the jury as follows: "Those plans which were put in evidence at the time the contract between the two defendants was offered, if they were admitted as evidence in the case against the steel company, should not be considered by you as against the Boston Electric Light Company; and if they were not admitted against the electric light company they must be wholly disregarded in the consideration of the case against the latter company."

The fourth request was given in the following form: "If the building which fell was being constructed by different contractors for the electric light company and not by the company itself, and the work of the contractors was not finished and the building was not completed when the accident occurred, and no agent or servant of the electric light company was directing or controlling, or had any direction and control over, any construction work, or operations there, then the electric light company, so far as I see, under the law could not be held."

In lieu of the sixth request, the judge instructed the jury as follows: "The fall of the roof is not in itself evidence of negligence on the part of the electric light company, or of the other defendant. The mere fact that the roof fell is not sufficient to charge anybody. That is, the plaintiff does not make out a case by showing that a person was injured or a man was killed. He must go further."

As supplementary to the eighth request, the judge instructed the jury as follows: "If all Mr. Ball had to do was to say whether the work was done according to contract, and exercised no direction about it how it should be done and when it should be done, or what should be done now and then, and interfered only so far as to approve or disapprove of work done, passing his judgment upon it, whether it was done under the contract or not, if that is all he did I instruct you that that would not be such an interference on behalf of the owner as to make the owner liable."

As to the ninth request, the presiding judge ruled that the questions therein referred to were for the jury, and further

instructed the jury as follows: "What Mr. Ball did, what he undertook to do, whether he interfered or not, whether he gave any directions or exercised any control of the work of the crane or of the building of the roof, or gave directions as to the construction of the walls, or anything, — that is a question entirely for you."

The jury returned a verdict for the plaintiff in the sum of $5,000; and the defendant alleged exceptions.

C. A. Snow, for the defendant.

J. E. Cotter, (*B. R. Doody* with him,) for the plaintiff.

HAMMOND, J. The immediate cause of the fall of the roof was the "buckling" or bending of several steel columns at the easterly end of the northerly wall of the engine room. Although the evidence as to the cause of this bending was vague and rather unsatisfactory, still it would warrant a finding in accordance with the testimony of the only expert witness called by the plaintiff, that the bending was due in part to the jar and strain caused by the operation of the crane before the brick wall which was to encase and strengthen the steel columns had been carried to a sufficient height; and that the operation of the crane under the circumstances was a negligent act.

At the trial it was contended by the defendant that, even if this was true, still the evidence failed to show that the crane was operated by the defendant or by any one for whose acts it was answerable, the ground of the contention being that the work upon the building was all being done under independent contractors over whom the defendant had no control. And the real question on this part of the case is whether or not the evidence was sufficient to warrant a finding that the crane was operated by the defendant.

The land was owned by the defendant and the building was being erected thereon by its procurement, and when completed was to be used by the defendant in its own business. In the absence of any explanation of the relation between the actual workers upon the building and the defendant, these facts of themselves would justify a finding that they were its agents and servants. It appeared however that there were several independent contractors upon the work, the Pennsylvania Steel Company, which had a contract covering the crane and all the

other steel work; Whidden, by whom all the brick and mason work was to be done; and perhaps McIntosh, who put on the terra cotta and other roof material. It further appeared that the engine foundation stones were to be furnished by the Cape Ann Granite Company and set by Whidden, but the nature of the contract with the Cape Ann company did not directly further appear. There was no evidence of any other independent contractors.

The crane was in position, and on several days before the accident was operated "for moving or hoisting foundation stones, machinery, big steam pipes, flagging and things connected with the engine, . . . but it did not appear under whose direction or control it was operated on any of these occasions unless it can be inferred from the evidence stated" in the bill of exceptions. "It did appear, however, that the crane was in no way under the control of Whidden, and that the operator of the crane was not in [his] employ."

Whidden testified that during the time the crane was thus in operation "the stone on one of the engine foundations had been set, and one stone on the second foundation . . .; that is, one whole foundation had been set and part of another." He also testified that the stones were brought into the building by the "granite man," who furnished them; and when asked what means were used for bringing the stones into the building and putting them into position where he could set them replied: "They were unloaded from the team by the crane." He further said that he could not tell whether or not the foundation stones which were thus laid before the accident were brought into the building and handled again before the crane was operated. Upon being shown the photograph of the date of July 18, he said that it appeared to him from the photograph "as if there were some of those stones piled down at the base of one of the engine foundations, and that one of the stones there was large enough to be the main foundation stone." It is clear that the jury might properly have concluded that this crane was used to move stones for the engine foundations, and that that work was a part of the contract neither with Whidden nor the granite company. There is nothing to show that the work done by the crane in hoisting or moving the machinery and steam pipes is

covered by any contract with an independent contractor. It is to be noted also, and the fact is admitted by the defendant on its brief, that the crane was to be ready for use before the completion of the building; and it is a fair inference that one of the uses to be made of it was the hoisting and moving of various heavy articles needed to complete and equip the building. It is further to be noted that the defendant declined to offer any explanation as to how it happened that the crane which it had caused to be placed in position was used for these various purposes.

In view of the ownership of the land and building, the purpose for which the latter was being constructed, the provision in the contract between the defendant and the Pennsylvania Steel Company that the crane should be ready some time before even the completion of the steel work, the work to which the crane was put, the fact that the work does not appear to have been covered by any agreement with an independent contractor, and the entire lack of any explanation of the defendant or any offer of evidence whatever on its part to clear up the matter, it is clear that the jury would be warranted in finding that the crane was operated by the defendant, its agents and servants. The first and fifth requests, therefore, were rightly refused.

The jury were instructed that the fall of the roof was not evidence of negligence on the part of the defendant. Whether it was evidence of neglect on the part of the steel company was not material to the case against the defendant.

The case against the defendant and the case against the steel company, which were pending at the same time, arose out of the same accident and were for the same injury. The evidence in each case was very largely the same, and it was within the discretion of the court to order that they be tried together. It was within the discretion of the judge at what time to submit each case to the jury, and we see no error of law in the course taken by the presiding judge. If the course taken was prejudicial to the defendant, the remedy is by motion for a new trial in that court.

Although the evidence as to the connection of Mr. Ball with the work is slight, still we see no error in the way in which the judge dealt with the requests as to his connection with the work.

The presiding judge seems to have left to the jury the question whether certain plans had during the trial been admitted in the case against the defendant, or only in the case against the Pennsylvania Steel Company. Assuming that he should have decided that question for himself, it nowhere appears in the bill of exceptions whether they contained anything prejudicial to the defendant, and hence we cannot see how it was harmed by this method of dealing with the matter.

While the judge declined to give the eleventh request in terms, still, so far as respects the purlines to be placed upon the easterly end of the building, the error, if any there was, seems to have been corrected in the colloquy between him and counsel for the defendant at the close of the charge, and the defendant has no ground for complaint as to this request.

The definition of gross negligence given at the end of the charge was sufficiently favorable to the defendant.

The charge was full and correct, and the case was properly left to the jury under instructions sufficiently favorable to the defendant.

Exceptions overruled.

DEXTER W. REID *vs.* CHARLES H. WRIGHT.
CHARLES H. WRIGHT *vs.* DEXTER W. REID.

Suffolk. March 13, 1902. — May 19, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Costs, Taxation. *Witness.*

When a case is in order for trial with a prospect that it will be reached speedily, and a person who may be wanted as a witness actually attends at a place in close proximity to the court house, with the purpose and expectation of going thence if necessary to the court house to be present at the trial of the case as a witness, and is then suffered to depart for the rest of the day, he fairly may be said to have attended as a witness on that day, and a witness fee for his attendance may be taxed.

MORTON, J. These two cases were argued together. The question relates in each case to the taxation of fees for two witnesses in favor of Reid who was the prevailing party in both

cases. The fees were taxed by the clerk and Wright appealed and the taxation was affirmed by the judge. The cases are here on exceptions by Wright to the refusal of the judge to rule as requested that the "witnesses were only entitled to fees for attendance when they were actually in court or for which they had been paid; the witness Charles to four days, the witness Holmes for three days." Charles and Holmes were the two witnesses whose fees were objected to.

It appeared that the cases were on the short list a greater number of days than were certified to by the witnesses. Charles was in actual attendance in the court room four days in answer to summonses. On the other days certified to by him he went to Reid's office on Court Street and ascertained from Reid or Reid's stenographer that he would not be wanted and went about his business without going to the court. To go to Reid's office he had to leave his business and go some distance away from it but he attended to his business afterward. He was paid $7 in cash in each case on a separate summons and had Reid's promise to pay him for the rest of the time at the same rate. "Holmes actually attended court on summonses four days and remained in the corridors four days, and one day went to Reid's office and was excused by him." There is nothing to show that there was any oppression or reckless expense or that in procuring the attendance of the witnesses Reid did not act in good faith. The objection is, in substance, that the witnesses did not attend unless they were actually in court during the number of days certified to.

In considering what shall constitute attendance by a witness the fact that persons who are or may be wanted as witnesses generally are engaged in business or occupations of their own should be taken into account and reasonable regard paid to it. If the witness Charles had gone to the court room and had then been excused for the rest of the day by Reid or by Reid's direction we cannot doubt that that would have constituted attendance as a witness on his part for that day. It is immaterial it seems to us that instead of going to the court room he went to Reid's office in close proximity to the court house. There is no statute that requires that a witness should attend all day in order to be entitled to his fee. Any attendance is a

day's attendance. There is no such thing as a fraction of a day in the attendance of a witness. And we think that when a case is in order for trial with a prospect that it will be reached speedily and a person who may be wanted as a witness actually attends at a place in close proximity to the court house with the purpose and expectation of going thence if necessary to the court room to be present at the trial of the case as a witness, that he fairly and reasonably may be said to attend as a witness in the case, and that it is immaterial that, after having so attended, he is suffered to depart for the rest of that day. These were or might have been found by the presiding justice to be the facts here. See *Miller* v. *Lyon*, 6 Allen, 514.

Exceptions overruled.

C. J. Noyes, for Wright.

J. Bennett, for Reid.

GEORGE W. NORRIS *vs.* ANDERS G. ANDERSON.

Middlesex. March 21, 1902. — May 19, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Attachment. Practice, Civil, Amendment.

Real estate was attached as the property of John Kavarik. There was no such person, and the owner's true name was John Kovarik. There was no fraud or attempt to conceal the attachment, and John Kovarik had actual notice of the service of the writ upon him. He did not plead the misnomer in abatement. *Held*, that on these facts the attachment could be found to be good against one who purchased the land without notice of it.

A description of land in an attachment is good if it would be sufficient to pass the land in a grant by the owner.

The only effect of an omission to give notice to a defendant of an amendment of the writ, which does not change or enlarge the cause of action or introduce any new party, is that the defendant is not precluded by the allowance of the amendment from afterwards contesting it.

Amendments to cure mere defects in form or clerical errors do not affect attachments. To dissolve an attachment or make it ineffectual as against a subsequent attaching creditor, purchaser or surety, the amendment must be such as to let in some new demand or cause of action.

Amending a writ by changing the name of the defendant from John Kavarik to John Kovarik, does not dissolve an attachment previously made on the same writ upon real estate of the defendant described as property of John Kavarik.

WRIT OF ENTRY, dated March 26, 1900, for certain premises on Wood Street in Woburn.

At the trial in the Superior Court before *Hardy*, J., without a jury, it appeared, that the tenant claimed title to the premises under a deed from one John Kovarik of Woburn to the tenant, dated October 27, 1899. The demandant claimed title under a sheriff's deed dated February 14, 1900, and by virtue of an attachment, made in the suit of one Alexander Ellis against the grantor of the tenant, on October 16, 1899.

The evidence tended to show that John Kovarik, on September 28, 1899, orally agreed to convey to the tenant the premises in question, the deed to be delivered on October 16; that on October 16, the time for passing the papers was postponed to October 27, at which time the tenant took his deed from John Kovarik.

The tenant before taking the deed employed Mr. W. J. Hennessey, an attorney at law, to examine the records and to pass upon the question of the title of John Kovarik. Mr. Hennessey examined the records in the registry of deeds in the county of Middlesex and reported, among other things, that the property was free from attachment, and, as a result of his investigation and report, the tenant took the deed from John Kovarik, reciting that the property was free from any incumbrances by way of attachment.

It appeared, however, that one Alexander Ellis had brought a suit returnable before the Fourth District Court of Eastern Middlesex, in which the defendant was named as John Kavarik, the writ being dated October 13, 1899, and on this writ one Wardwell, a deputy sheriff, made an attachment and stated in his return that on October 16, 1899, he had attached all the real estate of John Kavarik in the Southern District of the County of Middlesex, in which Woburn is situated, and that within three days thereafter he had deposited in the Registry of Deeds for the Southern District of the County of Middlesex a certified copy of the writ with so much of his return thereon as related to the attachment. The writ was returnable to the Fourth District Court of Eastern Middlesex on December 9, 1899. On the return day the plaintiff named in that writ, Alexander Ellis, by his attorney, George W. Norris, the demandant in this case,

moved to amend his writ by changing the name of the defendant from Kavarik to Kovarik, and this motion was allowed by the court without notice to any other person interested.

It appeared also, that Kovarik, the grantor of the tenant, was the defendant actually sued and served upon and had actually received notice of the suit by Ellis in which he was named as Kavarik.

It appeared also, that the tenant was not aware of the inception of the suit, of the amendment made on the date of entry, or of the fact that there was a claim by any one, that the attachment existed on the property of his grantor, John Kovarik.

It appeared, that in the records of attachments in the Southern District of Middlesex County, on October 27, 1899, there was a page in the book of attachments at the head of which appeared the name Kovarik, and that neither on this page nor on any other page in the book of attachments was there any record of any attachment having been made on the property of any person under the name of Kovarik.

Mr. Hennessey, who had examined the records and reported to the tenant that there was no attachment on the property of any Kovarik made in the year 1899, had his attention called to the claim of the demandant sometime after the entry of the suit of Ellis by his client handing to him a letter from the demandant, and immediately repaired to the Middlesex registry of deeds to verify the report which he had made before, and on finding the condition to be the same as he had reported to his client, the tenant, notified the demandant of his action and of the fact that there had been no attachment made on the property of Kovarik. Whereupon the demandant wrote to Mr. Hennessey a postal card, telling him to look under the name spelled Kavarik and he would find a record of an attachment made in favor of Alexander Ellis. On the receipt of this postal card Mr. Hennessey went again to the registry, and on a page more than forty pages in advance of the page set apart for attachments against the property of persons named Kovarik found a page on which a place had been set apart for attachments of property of persons by the name of Kavarik, and there found a record of the attachment upon the writ of Ellis filed within three days after October 16, 1899.

It further appeared, that the suit of Ellis against the tenant's grantor was brought upon a promissory note signed by him, and that the error in spelling the name of the defendant was due to an erroneous reading of the signature to the note; that the mistake in spelling the name was innocently made and with no intent to mislead or deceive any one; that although he had actual notice of the suit and called and talked with the demandant about it, the tenant's grantor entered no appearance in the action and suffered it to be defaulted; that judgment was entered against him on such default and execution was issued on the judgment; that the premises in question were sold on execution to the demandant and the proceedings on the sale were in conformity with the requirements of the statutes.

It further appeared, that the tenant had been in possession of the premises ever since the date of his deed and that the fair rental value of the premises was $200 a year.

Upon all these facts the tenant asked the judge to rule as follows:

1. On all the evidence a verdict should be ordered for the tenant.

2. The amendment to the writ in favor of Ellis, plaintiff, against Kavarik vacated the attachment.

3. The name Kovarik is not the same name as the name Kavarik.

4. The records of attachments in the registry of deeds were not sufficient in law to create an attachment on the property of Kovarik and the tenant, Anderson, took title free from the attachment on which the levy and sale were based.

5. The estate of Kovarik, if ever attached, was not under legal attachment on October 29, 1899, in favor of Ellis.

6. The levy and sale on the execution were not sufficient in law to give title to the demandant as against the tenant.

7. The title of the tenant is good as against any one claiming under the alleged attachment of October 16, 1899, on the writ in favor of Ellis and under the judgment, levy, execution and sale put in evidence in this case.

8. The amendment to the writ in the case of *Ellis* v. *Kovarik* was in the nature of the introduction of a new party.

9. No notice of the amendment to the writ having been given to the tenant, he cannot be affected by it.

The finding of the judge was as follows: "I find that John Kavarik and John Kovarik was the same person and no question as to such identity was made at the trial. I find that Ellis, or his attorney, in bringing the original suit did not use the name of another person nor did they fraudulently use a fictitious name, nor did they fraudulently attempt to conceal the fact that an attachment had been made.

"I find that John Kovarik had actual notice of the service of the writ upon him, and that he admitted that he had received such service before the entry of the writ.

"I grant the tenant's third request for rulings with the addition of the words, 'but I find that both names were used by the plaintiff as intended for the same person.'

"I deny the other requests of the tenant."

The judge found for the demandant, and, at the request of the tenant, reported the case for determination by this court.

If on all the evidence and findings the finding for the demandant and the rulings and refusals to rule were warranted, judgment was to be entered for the demandant accordingly; otherwise, the case was to stand for trial.

J. R. Murphy, for the tenant.

G. L. Mayberry, for the demandant.

BARKER, J. The only ground which can be urged against the validity of the attachment at the first is the mistake in the name of the defendant. The defendant was in fact John Kovarik of Woburn. The misnomer may have been matter for abatement if John Kovarik saw fit to plead it in abatement, but the writ was a writ against him. No statute provides that an attachment of real estate shall be ineffectual or void if the defendant is wrongly named in the writ, nor does any statute or decision require in terms that the documents which show the attachment shall state the correct name of the defendant. The attachment cannot be ruled as matter of law not to have been an attachment of the estate of John Kovarik because it described the property as that of John Kavarik of Woburn, it being shown that John Kavarik was not the name of any person, and that the mistake was not in any way fraudulent or an attempt to conceal the attachment.

The rule as to the description of the land necessary in an

attachment is that the description given in the return is sufficient if the same description would be sufficient to pass the land in a grant by the owner. *Taylor* v. *Mixter*, 11 Pick. 341, 350. Upon the evidence the judge could find that the description of the land in the return was sufficient and the attachment valid. See *Cleaveland* v. *Boston Five Cents Savings Bank*, 129 Mass. 27. The description in the return which was before the court in *Williams* v. *Brackett*, 8 Mass. 240, was a correct description of a different parcel of land from that intended to be attached and the defendant had an interest in each parcel of land, both that actually described in the return and that intended to be described.

On the other hand there is a plain distinction between this case and that of *Terry* v. *Sisson*, 125 Mass. 560, relied on by the tenant. There the attachment was of a deposit of the defendant's in a savings bank, and was by trustee process. That is a process devised to give the creditor the benefit of the property of his debtor which cannot be come at to be attached in the ordinary way. See Prov. St. 1758–59, c. 10; 4 Prov. Laws, (State ed.) 168; Anc. Chart. 614; St. 1794, c. 65. It is in a way governed by equitable considerations. In *Terry* v. *Sisson*, the alleged trustee owed the defendant a debt and was justified in paying that debt upon request if in fact in ignorance of the attempted attachment, and if that ignorance was not the result of negligence or breach of duty on the part of the trustee. In the present case the tenant was a voluntary purchaser not acting under any obligation to Kovarik.

Instances are not rare in which the constructive notice provided for by statutes requiring the registration of instruments proves insufficient to protect the interests of those for whose benefit they are intended, but who do not for that reason have a right to priority. See *Sykes* v. *Keating*, 118 Mass. 517; *Gifford* v. *Rockett*, 121 Mass. 431; *Ouimet* v. *Sirois*, 124 Mass. 162; *O'Connor* v. *Cavan*, 126 Mass. 117; *Gillespie* v. *Rogers*, 146 Mass. 610.

The remaining question is whether the attachment was dissolved or made ineffectual as to the tenant by the amendment allowed without notice to him upon the entry of the writ on the suit of Ellis. This amendment did not change or enlarge the

cause of action or introduce any new party, and the only effect of the omission to give the tenant notice of the motion to amend is that he was not precluded by its allowance from now contesting its effect. *Diettrich* v. *Wolffsohn*, 136 Mass. 335.

The tenant was not prejudiced by the amendment. Notwithstanding the misnomer, Ellis, like the plaintiff in *Cleaveland* v. *Boston Five Cents Savings Bank*, *ubi supra*, had the right to obtain a judgment and enforce the lien of his attachment, even without amending his writ if the defendant did not plead in abatement. Amendments to cure mere defects in form or clerical errors do not affect attachments. *Ball* v. *Claflin*, 5 Pick. 303. *Miller* v. *Clark*, 8 Pick. 412. *Haven* v. *Snow*, 14 Pick. 28, 33, 34. *Johnson* v. *Day*, 17 Pick. 106, 109. *Knight* v. *Dorr*, 19 Pick. 48. *Wight* v. *Hale*, 2 Cush. 486, 493. *Warren* v. *Lord*, 131 Mass. 560. *Cain* v. *Rockwell*, 132 Mass. 193. To dissolve the attachment or make it ineffectual as against a subsequent attaching creditor, purchaser or surety, the amendment must be such as to let in some new demand or cause of action. *Haven* v. *Snow*, *ubi supra*. *Wight* v. *Hale*, *ubi supra*. *Cutter* v. *Richardson*, 125 Mass. 72. *Kellogg* v. *Kimball*, 142 Mass. 124, 128. *Doran* v. *Cohen*, 147 Mass. 342. *Dalton* v. *Barnard*, 150 Mass. 473. *Townsend National Bank* v. *Jones*, 151 Mass. 454. *Driscoll* v. *Holt*, 170 Mass. 262.

As the attachment could upon the evidence properly be found to have been valid when made, and was so found, and as it was not dissolved or made ineffectual as to the tenant by the amendment, the rulings and refusals to rule excepted to by the tenant were not error.

Judgment for the demandant according to the finding.

JOHN N. FLAGG *vs.* EDWARD S. BRADFORD.

Worcester. September 30, 1901. — May 20, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Metropolitan Water Supply Act. Commonwealth. Trust.

The metropolitan water supply act, St. 1895, c. 488, does not create a trust in favor of landowners who become entitled to damages thereunder, but merely provides a fund out of which it directs the treasurer of the Commonwealth as a public officer and agent of the Commonwealth to make payments when amounts have been certified to him by the water board as due. Therefore a suit against the treasurer for such a sum must be treated as a suit against the Commonwealth.

There is no provision of law authorizing a suit to be brought against the Commonwealth in Worcester County for a sum of money certified by the metropolitan water board to be due for land in that county taken under St. 1895, c. 488, and conveyed by the plaintiff to the Commonwealth.

CONTRACT against the treasurer of the Commonwealth for $5,200 certified by the metropolitan water board to be due to the plaintiff for real estate in Boylston in the county of Worcester taken under St. 1895, c. 488, and conveyed by the plaintiff to the Commonwealth. Writ in the Superior Court in the county of Worcester dated March 7, 1901.

The Superior Court on motion of the Attorney General dismissed the action; and the plaintiff appealed.

H. Parker & H. H. Fuller, for the plaintiff.

J. M. Hallowell, Assistant Attorney General, for the defendant.

MORTON, J. This is an action to recover of the defendant as he is treasurer and receiver general of the Commonwealth a sum of money which has been certified to him by the metropolitan water board to be paid the plaintiff for land taken under St. 1895, c. 488. The action was brought in the Superior Court for Worcester County and a jury trial was claimed by the plaintiff. There was a motion to dismiss on the ground that the Superior Court for Worcester County had no jurisdiction of the case. This motion was granted, and the plaintiff duly excepted to, and appealed therefrom, and thereupon the judge of the Su-

perior Court by consent of the parties reported the case to the full court for its consideration and determination.

The action is in substance and effect, we think, an action against the Commonwealth. The liability is a liability of the Commonwealth arising out of the taking of land by the metropolitan water board for the purpose of a metropolitan water supply, and any judgment that might be rendered would be payable out of the proceeds of the bonds which the treasurer and receiver general is authorized to issue from time to time in the name and on behalf of the Commonwealth, on the request of the water board for the payment of the land taken and the damages and expenses incurred in the construction of the works. Although nominally against the defendant it seems to us plain that the action is really against the Commonwealth. See *Smith* v. *Reeves*, 178 U. S. 436. The statute does not create a trust in favor of landowners who become entitled to damages but merely provides a fund out of which it directs the defendant as a public officer and agent of the Commonwealth to make payment in such cases when the amounts due have been certified to him by the water board. The case of *Nash* v. *Commonwealth*, 174 Mass. 335, is not applicable.

The next question is whether there is any provision under which the Commonwealth can be sued in the courts of Worcester County for the sum certified to be due to the plaintiff. Our attention has not been called to any such provision. The statute under which the land was taken provides for the filing of petitions for the assessment of land damages in the county where the land taken is situated, but makes no provision in terms at least for the bringing of actions against the Commonwealth in cases like the present in that county. St. 1895, c. 488, §§ 13, 14. The provisions of § 28 on which the plaintiff relies were manifestly inserted *alio intuitu*, and do not authorize proceedings against the Commonwealth. The only statutes relating to the bringing of actions against the Commonwealth at the date of the writ in this case were Pub. Sts. c. 195 and St. 1887, c. 246. These have since been consolidated in R. L. c. 201, and they provide that suits against the Commonwealth can be brought in the county of Suffolk and do not provide that such suits can be brought in any other county. The Commonwealth can be

impleaded in its own courts only on such terms and in such manner as it chooses to enact. It follows that the motion to dismiss was rightly granted and that the order dismissing the action should be affirmed.

So ordered.

JAMES H. WHITTLE *vs.* LEVI W. PHELPS.

Worcester. September 30, 1901. — May 20, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Sale, Delivery. *Contract*, Substituted performance. *Lien.*

The owner of a brick yard in the town of Harvard agreed to furnish two hundred thousand bricks at $5 per thousand to be delivered in Worcester. A few days later he gave the buyer a bill of sale of the bricks, in which they were described as two hundred thousand bricks, more or less as desired, to be shipped from the northerly end of a certain kiln consisting of the first ten arches. The buyer thought he was buying merchantable bricks ready for delivery, and paid for them at once $800, retaining $200 to pay the freight. By agreement the buyer went to the brick yard where there were nine and a half arches of bricks set up and connected together but not burned. They were at the southerly end of the kiln named. The seller said, "These are your brick," and placed his hand on the arches, saying "Here are nine and one half arches, and there should be ten arches, which they are drawing in at the present time." The buyer said he was not ready to use the bricks, and the seller informed him that he could let them lie there as long as he pleased. *Held*, that this evidence would warrant a finding, that there was a sale and delivery of the bricks; that although the buyer when he took the bill of sale supposed he was buying merchantable bricks and the arches were described as being ten at the northerly end of the kiln, he finally accepted in performance of this contract a delivery of nine and a half arches of unfinished bricks at the southerly end, with the understanding that they were to be completed by the seller, the delivery being such as the nature of the property allowed.

One who takes a lease of a brick yard and a mortgage on all the personal property contained in it, purporting to include certain arches of unburned bricks belonging to a third person, does not acquire any lien on those bricks or right to their possession by burning and completing them.

MORTON, J. This is an action of replevin to recover possession of a quantity of brick. The case was tried by a judge of the Superior Court without a jury, and there was a general finding for the plaintiff. The defendant excepted to the refusal of the judge to rule that it did not appear that there was a suffi-

cient delivery to the plaintiff of the bricks replevied to pass the title, and that on all the evidence the plaintiff could not recover. The principal question relates to the delivery. There was testimony tending to show that one Bailey, the owner of a brick yard in the town of Harvard, agreed with the plaintiff in July, 1899, to furnish him two hundred thousand bricks at $5 per thousand to be delivered in Worcester, and that a few days after, namely, July 11, Bailey executed and delivered to the plaintiff a bill of sale of the bricks in which they were described as "two hundred thousand bricks, more or less as desired, . . . to be shipped from the northerly end of kiln No. 3, consisting of the first ten arches, located in the southerly end of kiln shed." The description in the writ substantially followed this. At the time of the execution of the bill of sale the plaintiff supposed that he was buying merchantable bricks ready for delivery, and it was agreed that he should pay for them at once, and he did so by giving his note for $800, retaining $200 to pay the freight. There was also testimony tending to show that it was agreed that the plaintiff should go to Harvard the following week and take possession of the bricks; that he went to the brick yard as agreed on July 18; that there were nine and a half or ten arches all set up and connected together but not burned; that Bailey put his hand on the arches on the southerly end of the kiln and said, "These are your brick"; "Here are nine and one half arches, and there should be ten arches, which they are drawing in at the present time"; that the plaintiff said that he was not ready to use the brick and would not be probably till the following spring and Bailey said he would let the bricks lie there as long as he pleased; that the plaintiff did not go to the brick yard again till the following April when he went to replevy the brick; and that the bricks that were replevied constituted eight and three quarters of the nine and a half arches of which the plaintiff took possession. It also appeared that shortly after the plaintiff had been to Harvard, namely, July 26, Bailey made a mortgage to the defendant of the personal property in the brick yard which included in its terms the brick in question and on July 31 leased the premises to him for a year; that he told the defendant that he had sold two hundred thousand bricks to the plaintiff; and that more arches were set up and

added to those that were there and all were burned by the defendant.

Upon this evidence we think that it was competent for the judge to find that there was a sale and delivery to the plaintiff of the bricks that were replevied. The sale was not a sale of bricks to be manufactured but of the brick in the nine and a half arches in the state in which they were, with the understanding and agreement that they were to be completed by Bailey. At least such could have been found to be the case by the judge. It is true that the plaintiff supposed that he was buying merchantable bricks ready for delivery, and they were described in the bill of sale as at the northerly end, but when the sale was consummated by delivery it turned out to be of unfinished bricks, and to include the nine and a half arches which were there and turned out to be at the southerly end. Until delivery took place, the sale was executory, and it was competent for the parties to agree upon whatever they saw fit as the subject matter of it. The property was bulky in its nature and it was not necessary in order to constitute a delivery that the plaintiff should take manual possession of it. *Parry* v. *Libbey*, 166 Mass. 112. *Jewett* v. *Warren*, 12 Mass. 300. It was sufficient if the delivery was such as the nature of the property admitted of, and the judge must have so found. Assuming that only merchantable brick were to be paid for, there was nothing in that circumstance to prevent the judge from finding that there was a sale and delivery of the nine and a half arches. *Macomber* v. *Parker*, 13 Pick. 175. The description in the writ of the brick as at the northerly end of the kiln was immaterial. It did not affect the identity of the brick that were sold and delivered and that were replevied. The subsequent conduct of the defendant in taking possession of the bricks and completing their manufacture, gave him no rights in or lien on the bricks.

Exceptions overruled.

C. F. Baker & W. P. Hall, for the defendant.

H. Parker, for the plaintiff.

ROBERT G. DODGE, administrator, *vs.* PHILIP H. LUNT, executor.

Essex. November 7, 1901. — May 20, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & LORING, JJ.

Gift. Estoppel, By conduct. *Savings Bank.*

A husband made deposits represented by five different bank books in his wife's name individually and as trustee in two savings banks, in which he had also ten other accounts. The deposits consisted principally of checks drawn by the husband on an account kept by him in a national bank and made payable to the savings bank. The wife died, and the husband as her administrator filed an inventory of her estate in which the five deposits were scheduled as her property and then as administrator transferred the deposits to himself as his own property and so accounted for them. The wife before dying had executed assignments of the five accounts to her husband, but these had never been presented at the savings banks. *Held,* that the fact that the husband had inventoried the deposits as the property of his wife did not preclude him from claiming them as his own, and that his account as administrator treating the deposits as his own property rightly was allowed.

MORTON, J. This is an appeal from a decree of the Probate Court allowing an account filed by the appellee as executor of the will of Nicholas B. Lake for the latter as administrator of the estate of his wife, Martha A. Lake. No account was rendered by Nicholas B. Lake during his lifetime. In the account filed by the appellee, the property is accounted for as the property of Nicholas B. Lake, transferred to him by himself as administrator of his wife's estate. The question is whether that is a proper accounting, or whether the property should be regarded as assets of the wife's estate.

The case was heard by a single justice, partly on agreed facts and partly on oral evidence and certain exhibits, and he affirmed the decree of the Probate Court.

Martha A. Lake died in 1883 leaving a husband and three children, a son and two daughters, surviving her. The husband was duly appointed administrator and gave bond with sureties, and filed an inventory in which the property in question consisting of deposits represented by five different bank books in her name individually and as trustee in two savings banks in New-

buryport was inventoried by him as belonging to her estate. Two of the children died shortly after she did; the son unmarried and without issue and the other, a daughter, Florence E. Moody, leaving a husband and one child. The appellant has been duly appointed administrator of Mrs. Moody's estate, and the remaining daughter has been appointed administratrix de bonis non of her mother's estate. In any event Mr. Lake's estate is entitled to two thirds of his wife's estate; — one half as her heir and one sixth as his son's heir. The deposits consisted in large part, nine tenths as one of the witnesses testified, of checks drawn by Mr. Lake to the order of the savings banks or the treasurer on an account kept by him in a national bank. And the question is whether they were gifts to his wife. It is to be noted that the checks were not payable to Mrs. Lake and the mere fact that the money was deposited in her name individually or as trustee does not necessarily show that it was a gift to her. *Booth* v. *Bristol County Savings Bank*, 162 Mass. 455. It may have been done by Mr. Lake for the purpose of multiplying accounts. That he was in the habit of multiplying accounts is shown by the fact that he had ten other bank books in these two banks. There was nothing shown as to the manner in which he dealt with the deposits during her life which required a finding that they were gifts to her. Sometimes she drew the interest, sometimes her husband did and sometimes they both did. And this was true in regard to deposits which admittedly belonged to him. The fact that she drew interest would show that she must have had possession of the books, but would not necessarily show that the books had been delivered to her as and for her own. Indeed, on one occasion when she drew the interest on one of the deposits in question and on another occasion when they both drew it, the interest was redeposited to the credit of an account belonging to him, which would tend to show that the deposit on which the interest was paid belonged to him also though standing in her name. It is true that assignments of the books in question to Mr. Lake from his wife were found with the books amongst his papers after his death, and that he inventoried the books as the property of his wife. But there is nothing to show that the assignments ever were presented at the banks, or to show under what circumstances they

were executed and delivered, if there was any delivery. There is nothing in the fact that assignments of the deposits had been executed from the wife to the husband which required a finding that they belonged to her and not to him. And as to the other matter Mr. Lake well may have deemed that his title would be regarded as more satisfactory if administration was taken out on his wife's estate by him and his title perfected by a transfer from himself as administrator. Neither he nor his executor would be concluded, we think, from showing that the deposits belonged to him or his estate by the fact that he had inventoried them as belonging to his wife's estate. *Brooks* v. *Hope*, 139 Mass. 351. *McGinity* v. *McGinity*, 19 R. I. 510.

As already observed there was testimony tending to show that nine tenths of the deposits in question consisted of money furnished by Mr. Lake. There is no direct evidence where the rest of the money came from. There was testimony tending to show that the wife had some money. But the single justice may have deemed it more probable that these deposits also consisted of money belonging to Mr. Lake, and we cannot say that such a conclusion was erroneous or unwarranted. The result is that we think that the decree should be affirmed.

So ordered.

R. G. Dodge, pro se.

J. T. Choate, (*J. C. M. Bayley* with him,) for the appellee.

WILLIAM BYRNES *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. January 7, 1902. — May 20, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Railroad, Duty to fence. *Negligence*, Mere licensees.

The statutory obligation of a railroad to fence, imposed by Pub. Sts. c. 112, § 115, amended by St. 1882, c. 162, is an obligation not to travellers but only to adjoining owners.

A railroad company is under no obligation to maintain a fence between its tracks and its freight yard or between its freight yard and an adjoining street.

Persons crossing an unfenced railroad freight yard between two intersecting streets, in order to make a short cut, are at most mere licensees, and the railroad company owes them no duty except not to injure them wilfully or recklessly.

TORT by an infant by his father and next friend for personal injuries. Writ dated December 8, 1890.

In the Superior Court the case was tried before *Lilley*, J., who ordered a verdict for the defendant. Later, *Lilley*, J. having resigned, the case was reported by *Bell*, J. for the consideration of this court. If the ruling of the judge ordering a verdict for the defendant was correct, judgment was to be entered on the verdict; otherwise, the case was to stand for trial.

J. W. Allen, for the plaintiff.

J. Abbott, (*S. Lincoln* with him,) for the defendant.

LATHROP, J. The plaintiff, a boy eight years of age, was injured while attempting to cross the tracks of the defendant's road. The accident took place between six and seven o'clock in the evening of July 16, 1889. At that time the defendant's road crossed at grade, and, at their intersection, two highways in Chelsea, called Sixth Street and Arlington Street. East of the crossing was the passenger station of the defendant; and west of the crossing the land between the intersecting streets was divided by the tracks into two triangular parts. The northerly portion between the tracks and Sixth Street was occupied and used by the defendant as a freight yard. The southerly portion between the tracks and Arlington Street was occupied as a granite yard. In the freight yard, near the line of the tracks, were two posts, one a gate post near the crossing and the other a telegraph post sixty feet from the crossing. The plaintiff with other boys, for the purpose of making a short cut, left Sixth Street before reaching the crossing, and entered the freight yard of the defendant intending to cross the tracks and pass through the granite yard to Arlington Street. In crossing the tracks about eighteen feet from the gate post the plaintiff stumbled and fell, and one foot was cut off by a passing train, which he knew nothing of until it struck him. It appeared that there was no fence between the freight yard and the tracks, nor between the freight yard and Sixth Street.

The plaintiff contends that it was the duty of the railroad, under the Pub. Sts. c. 112, § 115, as amended by the St. of 1882, c. 162, to have had a fence between its freight yard and its tracks; and that the omission to comply with the statute is evi-

dence of negligence. The object of the statute is expressed to be "to prevent the entrance of cattle upon the road"; and cases that have arisen under it are all cases of this kind. *Rogers* v. *Newburyport Railroad*, 1 Allen, 16. *Eames* v. *Salem & Lowell Railroad*, 98 Mass. 560. *Baxter* v. *Boston & Worcester Railroad*, 102 Mass. 383. *Eames* v. *Worcester & Nashua Railroad*, 105 Mass. 193. *Keliher* v. *Connecticut River Railroad*, 107 Mass. 411.

But the omission to fence does not render a railroad company liable except as against adjoining owners; and if a horse escapes from the highway on to an unfenced lot and thence to the railroad, where it is injured, the owner cannot recover unless there was reckless or wanton misconduct on the part of those in charge of the train. *Maynard* v. *Boston & Maine Railroad*, 115 Mass. 458. *McDonnell* v. *Pittsfield & North Adams Railroad*, 115 Mass. 564. *Darling* v. *Boston & Albany Railroad*, 121 Mass. 118.

We find nothing in the statute or in our cases which requires a railroad corporation to have a fence between its own tracks and its freight yard; and it is clear that it was not bound to have a fence between its yard and the street.

There is nothing in the case to show that the defendant maintained or constructed a way across its freight yard, which the public was invited to use. The most that can be said on the evidence is that people were in the habit of crossing the yard in order to make a short cut. All doing so were at most mere licensees, to whom the defendant owed no duty except not to injure them wilfully or recklessly. As there is no evidence of any wilful or reckless misconduct on the part of the defendant, the ruling that the action could not be maintained was right. *Wright* v. *Boston & Albany Railroad*, 142 Mass. 296. *Donnelly* v. *Boston & Maine Railroad*, 151 Mass. 210. *Chenery* v. *Fitchburg Railroad*, 160 Mass. 211. *Brayden* v. *New York, New Haven, & Hartford Railroad*, 172 Mass. 225.

Judgment for the defendant.

WILLIAM HUGHSON *vs.* WINTHROP STEAMBOAT COMPANY.

Suffolk. January 9, 1902. — May 20, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Ship. Carrier.

The holder of a ticket entitling him to a round trip on an excursion steamer has no right of action against her proprietor for being left behind by reason of the boat starting on her return trip before the advertised time, if the government inspector had refused to allow any more passengers to go on the boat.

TORT by the holder of an excursion ticket for leaving him at the Salem Willows on the afternoon of a Sunday by reason of the steamer starting before the advertised time. Writ in the Municipal Court of the City of Boston dated September 7, 1900.

On appeal to the Superior Court the case was tried before *Stevens*, J., who ordered a verdict for the defendant; and the plaintiff alleged exceptions.

N. F. Hesseltine, for the plaintiff.

J. S. Sullivan, for the defendant.

LATHROP, J. The plaintiff, on Sunday, August 5, 1900, bought four round-trip tickets which entitled him and three friends to be carried from Boston to Salem Willows and return. The steamboat was advertised to return at a quarter to five in the afternoon; but she left ten minutes before that time. The boat did not have a license to run on Sunday, and the government inspector, before the time of sailing, had refused to allow any more passengers on board. There was evidence that the return tickets were good for any day; and the evidence was contradictory on the point whether the defendant offered to pay for the return tickets, and to pay the fare to Boston on the electric cars. The judge ruled that on all the evidence the plaintiff could not recover damages; and the case is before us on the plaintiff's exceptions.

The plaintiff does not sue in contract, but in tort. The only wrong alleged in the declaration is that the defendant agreed to return from Salem Willows at 4.45 P. M., and that it wilfully

and negligently did not return at such time, but left Salem Willows at 4.15 P. M.

In *Sears* v. *Eastern Railroad*, 14 Allen, 433, 436, where the plaintiff sued for the neglect of the defendant to run a train of cars at the advertised time, and the declaration contained a count in contract and one in tort, it was said by Mr. Justice Chapman, in delivering the opinion of the court: "If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff." However this may be, in the present case we are of opinion that the ruling was right. By § 4465 of the U. S. Rev. Sts. it is declared: "It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection." The refusal of the government inspector to allow any more passengers to go on the boat, justified the master of the boat in leaving before the advertised time. The plaintiff would have gained nothing if the boat had waited ten minutes longer, for he and his friends would not have been allowed to go on board.

Exceptions overruled.

CHARLES MORRIS *vs.* WALWORTH MANUFACTURING COMPANY.

Suffolk. January 10, 1902. — May 20, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability.

In an action for personal injuries by one employed as a helper in the defendant's iron works, it appeared, that the plaintiff was ordered by a person, who he said was "boss" and had six or seven and perhaps more men under him, to carry pieces of pipe to a part of an unfinished building of the defendant which was reached by passing over a temporary bridge laid that morning, formed by three planks side by side fastened together by a piece of wood nailed underneath in the middle, that as the plaintiff after leaving a piece of pipe was returning over the planks, one of them tipped or bent, his toes caught and he fell and broke one of his legs, and that after the accident he noticed that some of the nails had come out of the cleat. *Held*, that, if the person called "boss" was acting as superintendent and was not merely a foreman in charge of a gang, it did not appear that he had anything to do with the planks; *also*, that the planks could not be

considered ways or works within the meaning of the employers' liability act, being used only for a temporary purpose; *also*, that the evidence would not warrant a jury in finding that the defendant was negligent in failing to furnish the plaintiff with a suitable and safe way over which to pass in doing his work.

LATHROP, J. The plaintiff was injured while in the employ of the defendant. The declaration contains two counts, one under the St. of 1887, c. 270, § 1, and the other at common law. The case comes before us on the defendant's exception to the refusal of the judge to rule at the close of the evidence that the plaintiff could not recover.

The plaintiff was between twenty-nine and thirty years old. He had been in this country between five and six years. Before coming here he had done farmer's work and work as a helper in iron foundries. After his coming, he worked on farms about five months, and the rest of the time in factories on iron work, and for three years of the time he helped put up fire escapes on finished and unfinished buildings. He worked on stagings, on platforms, and on planks.

The plaintiff was employed by the defendant as a helper at its works in South Boston, and had been so employed a little more than five months, working as a helper for everybody. At the time of the accident he was at work on a new building belonging to the defendant. The outer walls were up and it was roofed in. On the outside of the building was a platform which extended the whole length of the building, and was about twenty-five feet wide, and five feet high from the ground, with steps leading to the ground. There was an opening about six feet wide in the wall of the building on to this platform; and there was a brick retaining wall on the inside of the building extending from the corner of the opening at a right angle, and all the floor space beyond this retaining wall had been filled with ashes level with the top of the wall.

For three days before the accident there had been but one plank, connecting the opening in the outer wall with the retaining wall inside. The plaintiff testified that some of the men put it there; that on the morning of the injury there were three planks laid across this corner, each five or six inches wide, and six, seven or eight feet long, fastened together by a piece of wood nailed underneath in the middle, and projecting slightly

beyond the planks; that he was set to work by one Riddell and directed to take pipe into the place where the ashes were and lay them there; that he took one piece in and set it, and on coming out, in walking over the planks, one of them tipped or bent, his toes caught, and he fell and broke one of his legs; and that he noticed after the accident that some of the nails had come out of the cleat.

It is contended that Riddell was either a superintendent, or that he was acting as superintendent with the authority or consent of the employer, under the St. of 1894, c. 499. All the evidence on this point comes from the plaintiff, who, when asked "What did John Riddell do about there?" said, "He is boss"; and in answer to another question said he had perhaps six or seven, perhaps more, under him. Without stopping to consider whether this is enough to show more than that he was merely a foreman in charge of a gang, we are of opinion that there is nothing to show that Riddell had anything to do with the planks, or that there was any negligence on his part in respect to them. For aught that appears the planks were fastened together by some of the fellow workmen of the plaintiff.

We are also of opinion that the planks cannot be considered as ways or works within the statute. They were used merely for a temporary purpose. *Lynch* v. *Allyn*, 160 Mass. 248. *Burns* v. *Washburn*, 160 Mass. 457. *Adasken* v. *Gilbert*, 165 Mass. 443, 445. *Beique* v. *Hosmer*, 169 Mass. 541.

Nor do we find any evidence which would warrant the jury in finding a verdict for the plaintiff on the count at common law. The plaintiff failed to show negligence on the part of the defendant.

Exceptions sustained.

H. E. Warner, for the defendant.

H. P. Harriman & J. F. Neal, for the plaintiff.

DAVID REGAN *vs.* SAMUEL LOMBARD & another.

Suffolk. January 13, 1902. — May 20, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Exceptions. *Negligence*, Employer's liability.

A declaration at common law by a workman in a stone yard alleged that the plaintiff was injured by the negligence of the defendant in not furnishing suitable and proper dunnage to be placed between the stones of a pile of curbstones which fell upon the plaintiff. The presiding judge refused a request of the defendant to rule that upon all the evidence the plaintiff was not entitled to recover. The request refused did not refer to the pleadings. The jury returned a verdict for the plaintiff. *Held*, that on the argument of an exception taken by the defendant to the refusal of the ruling, it was open to the plaintiff to contend that the fall of the stones was due not only to the want of proper dunnage but to the stones being piled improperly, as an amendment of the declaration might have been allowed if the attention of the judge had been called to the matter.

A workman in a stone yard cannot recover at common law against his employer for injuries from the falling of a pile of curbstones caused by improper dunnage or by improper piling, if the stones were piled by his fellow servants and the dunnage placed between them was selected by those servants.

LATHROP, J. The plaintiff, while in the employ of the defendants, was injured by the falling upon him of a pile of curbstones, on June 13, 1899. The case was submitted to the jury on a count under the St. of 1887, c. 270, § 1, cl. 2, and a count at common law. The jury returned a verdict for the plaintiff under the latter count, and the case is before us on the defendants' exceptions to the refusal of the judge who tried the case in the Superior Court to rule, at the close of the plaintiff's evidence, that upon all the evidence the plaintiff was not entitled to recover, and to direct a verdict for the defendants.

The count at common law was based upon the alleged negligence of the defendants in not furnishing suitable and proper dunnage to be placed between the stones, when they were placed one upon the other. At the argument before us, the plaintiff's counsel also contended that the stones were improperly piled, and as the request for a ruling did not refer to the pleadings, we agree that this point is open to the plaintiff, as an amendment might have been allowed if the attention of the judge had been called to the matter.

The defendants were copartners and for many years had carried on a general teaming business in Boston, requiring about one hundred horses, and also had carried on a granite business, with several stone yards, one of which was at a wharf in Charlestown, where the accident occurred. They dealt principally in large curbing stones. Some of the stones were straight, and others, called circle stones, were curved, forming segments of circles of different radii. The stones varied from five to ten feet in length, from eighteen to twenty inches in width, and from seven to twelve inches thick, being about seven inches thick on the top and from seven to twelve inches on the bottom. These stones came by water, and were unloaded from scows on to the wharf. Some forty or fifty feet back from the cap of the wharf stood a permanent derrick with a long boom which could be raised and lowered in the usual way, and which also swung around describing a circle. The stones were taken by means of this derrick, after they were unloaded, upon the wharf and placed in piles or tiers around the circle described by the boom of the derrick, one end of each pile pointing toward the derrick and the other radiating from it. These tiers of stones formed two circles around the derrick, an inner and an outer circle. The stones were deposited on or taken from the outer circle by lowering the boom, and from the inner circle by raising the boom. The circle stones were placed with their convex side down, the circle stones having the same radii being piled in the same tier or tiers; some of the tiers were from five to ten stones high. These tiers of stone were usually placed near together, the inner ends being six inches apart and the outer ends further apart, being the outside of the circle. Two sticks or pieces of wood called dunnage were placed between every two stones as they were piled at right angles with their length, and from one quarter to one third distant from each end, separating the stones three inches more or less according to the contour of the stones and the thickness of the sticks of wood, separating the stones sufficiently to draw out or put under a chain, and these pieces of wood should be so placed that those in one layer would be directly above those in the layer below. Ordinarily two pieces of wood were used, but sometimes it was necessary to chink up and put in several small pieces in order to keep the piles level.

As stones were sold they were taken in the same way by the derrick from the tier where the stones of the same radius and dimension were found and loaded upon teams, so that the heights of the tiers varied from time to time. At the time of the accident, a tier in the outer circle on the west side of and about opposite the mast of the derrick, that is, about equally distant back from the cap of the wharf, contained five circle stones. The next tier from the north or water side contained one stone; the next tier on the north side contained two or three stones.

On the day of the accident, the plaintiff and one Hanlon, employed by the defendants, were intending to remove the top stones from this tier of five to get out the third stone from the top. The plaintiff was standing on one side of the tier ready to assist when the three top stones fell or slid off towards the plaintiff, throwing him down and pinning him against the second tier on the north from the one in question, causing the injuries complained of.

The plaintiff had been in the employ of the defendants as a teamster for fifteen or sixteen years. Several months before the accident the plaintiff had been thrown from his team and received injuries which had prevented him from working until about two or three weeks before the present accident. When he returned to the defendants' employ, the defendants set him at work to look after paving stones, in the defendants' yard in Cambridge, and after that he worked in another yard of the defendants at the Boston and Maine Railroad before coming to the yard in Charlestown where the accident occurred.

The only witnesses called by the plaintiff on the question of liability were himself and Samuel Lombard, one of the defendants. Neither of them testified as to the condition of the dunnage at the time of the accident, and, while there was evidence that the dunnage furnished was from old material, there was no evidence that such material was not suitable for the purpose for which it was used, or that the dunnage used in the pile that fell was unsuitable when first placed in the pile, or that it was rotten at the time of the accident. The evidence shows that when a pile was made the plaintiff and his fellow servants selected what pieces of dunnage they needed, and inserted it between the stones.

We do not find any evidence that the stones were not piled properly. If they were not, it was the fault of the fellow servants who piled them.

There is no evidence that the defendants employed incompetent servants, and it does appear that the plaintiff was a man of great experience in the piling and handling of stone.

It is contended by the plaintiff's counsel that the stones were placed in position in September prior to the accident, and that they had not been moved until the day when the accident happened, and that the dunnage had become rotten by its exposure to the weather. We are of opinion that this is not a reasonable inference from the evidence. Lombard testified as follows: "The last shipment of curbstone to the yard was in September prior to the accident. That did not in any way indicate that the pile had remained there for that time, because the stones came in various lengths, from five to nine feet, and with radii varying from six to thirty feet, and if any stone of any particular length was desired the stones on top would have to be removed in order to avoid cutting off the extra length on the stone, so that these piles were continually being moved; for example, if a stone six feet long was under a stone nine feet long, they would take down the upper stone to get at the lower one rather than use the upper one and cut it off. There had been a good many changes in the piles of stones subsequent to the time when they had been left there in September." So the plaintiff testified: "The picking out of a particular stone was being done there right along so the piles had to be changed to get out the stone wanted. They were continually picking out these stones and changing them over." He further testified that he did not know when any particular pile was handled over or any of the stones taken out; and that he did not know when the pile that fell had been handled over.

It did not appear how long the pile had been likely to fall nor what was the cause of the fall; and the burden of proof was on the plaintiff to show this. *Fitzgerald* v. *Boston & Albany Railroad*, 156 Mass. 293.

We have then a case where the tier was placed in position by the fellow servants of the plaintiff, and on the evidence it was conjectural how long it had been piled. The dunnage was

selected by the fellow servants. If the fall was caused either by the use of improper dunnage or by improper piling, the fault was that of the fellow servants, for whose negligence the defendants were not responsible. *Reed* v. *Boston & Albany Railroad*, 164 Mass. 129. *Kenneson* v. *West End Street Railway*, 168 Mass. 1. *Leary* v. *Fitchburg Railroad*, 173 Mass. 373. *Carter* v. *Boston & Albany Railroad*, 177 Mass. 228.

The case of *Millard* v. *West End Street Railway*, 173 Mass. 512, differs essentially from the case before us. In that case the action was not brought at common law, but under the St. of 1887, c. 270, cl. 2. The pile of timbers which fell was erected under the supervision of a superintendent of the defendant, who carelessly ordered it to be done in a way which would be likely to cause it to tumble down, and who, when his attention was called to the matter, persisted in his own way of doing the job. The plaintiff in that case knew nothing about the manner in which the pile was built until the moment of the injury. In the case before us the count was at common law, the pile was not put up under the direction of a superintendent, but by the fellow servants of the plaintiff; and there is no evidence to show that the mode of putting it up was faulty.

On all the evidence we see no ground upon which the plaintiff was entitled to go to the jury upon the count at common law. We express no opinion upon the other counts.

Exceptions sustained.

W. B. Sprout, (*C. S. Knowles* with him,) for the defendants.

H. E. Bolles, (*J. F. Boles & O. O. Partridge* with him,) for the plaintiff.

JOSEPH L. HARDING *vs.* H. EMMA RILEY.

Middlesex. January 20, 1902. — May 20, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Amendment after verdict, Costs.

It is within the power of a trial court to allow the attaching officer after verdict and before judgment to amend his return on the writ by adding thereto certain charges and fees for the care and custody of the property, this being especially permissible where the amendment relates to matters that occurred after the entry of the writ. If the defendant wishes to object to the officer's charges he must appeal from the taxation of costs by the clerk.

LATHROP, J. After a verdict for the plaintiff in an action of contract, and before judgment, the officer who attached certain property on mesne process moved to amend his return on the writ by adding thereto certain charges and fees for the care and custody of the property. The defendant objected on two grounds, first that the officer could not charge any of the fees on the amended return, secondly, that the sale was illegal because delayed too long; and asked the judge so to rule. The judge refused so to rule, and allowed the motion; and the case is before us on an appeal and a bill of exceptions.

We are of opinion that the questions sought to be raised by the defendant are not properly before us. There can be no question that it was within the power of the court to allow the officer to amend his return, especially where, as here, the amendment related to matters which had occurred after the entry of the writ. The proper amount to be allowed is to be determined, in the first instance, by the clerk on the taxation of costs. From his decision an appeal will lie to a judge of the Superior Court: and from his ruling on a matter of law an appeal will lie to this court, or the questions of law may be brought here on a bill of exceptions. *Cutter* v. *Howe*, 122 Mass. 541. *Clark* v. *Gamwell*, 125 Mass. 428. *Carroll* v. *Daly*, 162 Mass. 427. *Rogers* v. *Simmons*, 155 Mass. 259, 261.

Appeal dismissed; exceptions overruled.

H. Dunham, for the defendant.

G. L. Mayberry, for the plaintiff.

H. EMMA RILEY *vs.* BRADSHAW S. TOLMAN.

Middlesex. January 20, 1902. — May 20, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Attachment. Evidence. Witness.

In an action against a deputy sheriff for attaching personal property on a milk farm conducted by the plaintiff, a married woman, the plaintiff had given notice to the defendant under Pub. Sts. c. 161, §§ 42, 43, to remove the property without delay. The officer removed it to a certain barn, and the plaintiff contended that this removal was not good in law because the barn was on her premises. The defendant's return stated, that he had removed the property to a place of safe keeping, and he testified that the barn belonged to and was occupied by one H. the owner of the farm. The plaintiff's husband testified, that he managed the milk business for his wife and hired the farm including the barn. *Held*, that there was no evidence that the barn was on premises hired by or belonging to the plaintiff, or that she occupied it.

In an action against a deputy sheriff for the conversion of the plaintiff's goods attached by him, in which the plaintiff's title was not in dispute, the plaintiff offered in evidence receipts signed by the attaching creditor acknowledging payment for the goods by the plaintiff. The evidence was excluded. *Held*, that the evidence properly was excluded as immaterial, and that it was not necessary to consider whether, if the plaintiff's title had been in dispute, it would have been admissible.

In an action by a married woman, her husband was a witness for her and was asked on cross-examination, whether he had not a few days before in the trial of another case testified contrary to the testimony which he gave on his direct examination, and was allowed to answer. The court assumed in deciding the case, that the witness's testimony on his direct examination was true. *Held*, that so far as the questions put and the answers given tended to contradict the witness they were admissible, and whether the cross-examination went further than that was immaterial.

TORT by a married woman, carrying on a milk business, against a deputy sheriff, with a count for the conversion of, and another count for unlawfully taking and carrying away, certain cows, horses, wagons, hay, straw and other property belonging to the plaintiff, with a third count for failure to remove the keeper and property without delay after notice to do so and for continuing to occupy the premises of the plaintiff after a reasonable time. Writ dated December 18, 1899.

In the Superior Court *Sherman*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. Dunham, for the plaintiff.

G. L. Mayberry, for the defendant.

LATHROP, J. The defendant, a deputy sheriff, attached on mesne process certain personal property of the plaintiff on two writs, one in favor of Joseph L. Harding* and the other in favor of John R. Farnum, and appointed a keeper of the property. The attachment on the first writ was made on December 12, 1899, and that on the second writ on December 16, 1899. The day before the last attachment, the plaintiff gave the defendant notice to remove the keeper and the property without delay, in accordance with the Pub. Sts. c. 161, §§ 42, 43. Subsequently the defendant moved the property, and the plaintiff admitted at the trial that there was no unreasonable delay in moving it, if it was moved at all.

The contention of the plaintiff was that the property was moved simply from one part of her premises to another. The return of the defendant sets forth the receipt of the notice, and proceeds as follows: "and on December 16th in accordance with said notice, I removed said property to a place of safe keeping, and hold the same to respond to the judgment of this suit." This was at least prima facie evidence of the fact of removal. *Livermore* v. *Bagley*, 3 Mass. 487, 513. *Bruce* v. *Holden*, 21 Pick. 187, 189. *Lothrop* v. *Ide*, 13 Gray, 93. *Whithead* v. *Keyes*, 3 Allen, 495, 498. *McGough* v. *Wellington*, 6 Allen, 505.

The defendant, who was called as a witness by the plaintiff, testified that he received the notice late in the evening of December 15, and moved the hay, the cattle, the pung, the harnesses and the straw into Harding's barn, and the rest of the goods to Farnum's place; and that he sold them all on May 18, 1900. He also testified that the barn belonging to Harding was on the Lowell Grove farm; that this farm belonged to one Bigelow, as trustee, and was in charge of one Viles; that Harding had the occupation of the barn; and that Harding was not living on the farm at this time, but had some of his property in this barn, though nothing of any great value.

The plaintiff did not testify as a witness, and the only other witness on this point was the plaintiff's husband, who testified that he hired the Lowell Grove farm from Harding, and managed

* See *ante*, 334.

the milk business for his wife there, and that the barn to which some of the property was removed, was on the premises hired by him.

On this evidence the judge rightly ruled that the action could not be maintained. There was no evidence that the Harding barn was on premises belonging to, or hired by, the plaintiff. Nor was there any evidence that she occupied it.

Some questions of evidence remain to be considered. The plaintiff offered in evidence two receipts from Harding to her for money paid for some of the attached property. These were excluded, and the plaintiff excepted. We need not consider whether under other circumstances than existed in this case they would have been admissible, (see *McAvoy* v. *Wright*, 137 Mass. 207, 209; *Brooks* v. *Duggan*, 149 Mass. 304, and *Silverstein* v. *O'Brien*, 165 Mass. 512,) because her title to the property covered by the receipts was not in dispute. The receipts were entirely immaterial.

The plaintiff's husband was asked some questions on cross-examination for the purpose of showing that a few days before, in the trial of another case, he had testified contrary to the testimony which he gave on direct examination in the present case. So far as the questions put and the answers given tended to contradict him they were clearly admissible. *Allin* v. *Whittemore*, 171 Mass. 259. Whether the cross-examination went further than this is immaterial, as the case was taken from the jury, and we have assumed, in deciding the principal question in the case, that his testimony on direct examination was true.

Exceptions overruled.

LEONARD C. WASON & another *vs.* J. WILLIAM BUZZELL & others.

Suffolk. January 20, 1902. — May 20, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Jurisdiction. Corporation, Foreign.

This court will not assume jurisdiction to determine the validity of an election of directors of a corporation organized under the laws of another State having a usual place of business in this Commonwealth and authorized to do business here.

PETITION, filed October 18 and amended December 17, 1901, for a writ of mandamus addressed to the officers of the Contractors Plant Company, a corporation organized under the laws of the State of Maine, authorized to do business in this Commonwealth and having its usual place of business in Boston, commanding the respondents Buzzell and Buffum to refrain from attempting to act as directors of that corporation, and commanding the respondents Cross, Gilbreth and Webber to recognize and receive the petitioners as directors, and to act with them as such in the business of the corporation.

The case was heard by *Barker*, J., who sustained a demurrer of the respondents to the amended petition on the ground stated by the court and ordered that the petition be dismissed; and reported the case for the determination of the full court, such disposition to be made thereof as law and justice might require.

F. L. Norton, for the petitioners.

F. S. Elliot, for the respondents.

HAMMOND, J. The petitioners allege that they are two of five directors of a corporation organized under the laws of the State of Maine, having an office in Portland in that State, authorized to do business in this Commonwealth and having its usual place of business here in Boston; and they bring this petition against the corporation, the three remaining directors and two other persons, for a writ of mandamus commanding these three directors to recognize and act with the petitioners as

directors and commanding the other respondents to refrain from attempting to act as directors. All the individual petitioners and respondents are residents of this Commonwealth.

A demurrer to the bill upon several grounds, one of which was that the subject matter of the controversy concerns the internal management of the affairs of a foreign corporation, was sustained by a single justice of this court and the bill ordered to be dismissed; and the case is before us upon a report made by him, such disposition thereof to be made as law and justice may require.

It is plain that the demurrer must be sustained. The only thing in controversy is whether the petitioners have been elected directors in accordance with the law of the home of the corporation, a question relating simply to the official relations existing between them and the corporation. This is a question relating solely to the management of the internal affairs of the corporation. Although there is some difference in the various States as to whether jurisdiction shall be taken in such a case (see *North State Copper & Gold Mining Co.* v. *Field*, 64 Md. 151, and *State* v. *Cronan*, 23 Nev. 437), we are satisfied that the better rule is that such questions should be settled by the courts of the State in which the corporation is domiciled, and we must decline to take jurisdiction. See *Kimball* v. *St. Louis & San Francisco Railway*, 157 Mass. 7, and cases cited.

Petition dismissed.

THOMAS WHITE *vs.* APSLEY RUBBER COMPANY.

Middlesex. March 4, 1902. — May 20, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Abuse of Legal Process.

An action will lie for maliciously procuring the arrest of the plaintiff on a criminal charge in order to compel him to abandon a claim of right of occupation of a certain house and actually to withdraw from its occupation, and it is no defence to such an action that the prosecution has not been terminated, although this would be a defence to an action for malicious prosecution.

TORT with two counts for malicious prosecution and two for abuse of criminal process. Writ dated April 4, 1898.

At the trial in the Superior Court before *Blodgett*, J., it appeared, that the plaintiff was in charge of a boarding house belonging to the president of the defendant and used for its employees, the furniture belonging to the defendant; that the defendant wished to remove the plaintiff and put in his place a family named Gray; and that the Grays took possession of the kitchen and proposed to make use of the cooking stove, whereupon the plaintiff took the stove covers and carried them to his own room, so that the stove could not be used. One Bailey, an agent of the defendant, procured a warrant for the plaintiff's arrest on the charge of wilfully and maliciously injuring personal property of the defendant, by the removal and concealment of the lids or covers of a certain cooking stove. The plaintiff was arrested by an officer who came with Bailey, and finally was released on agreeing to move out of the house. This he did, taking his family and belongings. On the order of the officer he brought back the stove covers, which were not injured. The warrant was never returned into court, and no further proceedings were had.

The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, which, after the resignation of *Blodgett*, J., were allowed by *Fessenden*, J.

C. F. Choate, Jr., for the plaintiff.

G. A. A. Pevey, (*J. T. Joslin* with him,) for the defendant.

BARKER, J. It is conceded that criminal proceedings were begun against the plaintiff by a sworn complaint made to a trial justice charging that the plaintiff had wilfully and maliciously injured the personal property of the defendant, and that a warrant for the plaintiff's arrest was issued upon the complaint and placed in the hands of a police officer who then went to the house where the plaintiff was. The evidence tended to show that the plaintiff was arrested upon this warrant at the house and kept under arrest for some minutes during which he went with the officer to the defendant's office and then returned with him to the house and that he was not released from the arrest until he had abandoned a claim to the right to occupy the house and had left it finally taking away with himself and

his wife such goods of his own as were in the house when he was arrested.

The evidence also tended to show that the defendant caused the making of the complaint and the arrest, and made use of the arrest to compel the plaintiff against his will to abandon a claim to the right to occupy the house and to compel him actually to withdraw from its occupation. The warrant has never been returned and since it was issued there has been no judicial action upon the complaint. The fact that the prosecution has not been terminated bars any recovery upon the counts for malicious prosecution. *Cardival* v. *Smith*, 109 Mass. 158. *Wood* v. *Graves*, 144 Mass. 365, 366. See *Wilson* v. *Hale*, 178 Mass. 111. But that fact is not a defence to the counts for abuse of process. *Wood* v. *Graves*, *ubi supra*. A misuse of the warrant and the arrest to compel him to quit the house and relinquish his claim to the right to its occupancy would give him a right of action.

Exceptions sustained.

FREDERIC F. HASKELL, trustee, *vs.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Suffolk. March 5, 1902. — May 20, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Pleading. Insurance, Life. Bankruptcy.

In an action by a trustee in bankruptcy to recover the cash surrender value of an insurance policy on the life of the bankrupt, the declaration must contain averments showing that the policy has a cash surrender value, and if issued in another State the laws of that State giving such a policy a cash surrender value must be stated as facts. An averment that "said policy was an asset, it having at the time a cash surrender value of $692.50," is bad on demurrer, being either a conclusion of law or a deduction of fact from primary facts not stated and necessary to set forth a cause of action.

If a bankrupt at the time of his bankruptcy holds a life insurance policy providing that, if he dies within twenty years, the company shall pay the amount of the policy to his mother if living or if she is dead to his estate, and at the end of twenty years, if he survives, the company shall pay it to him, he has a valuable interest in the policy which passes to his trustee; but the trustee cannot sur-

render the policy without the consent of the mother, and in suing for the cash surrender value of the policy must allege that such consent of the beneficiary has been given.

CONTRACT by the trustee in bankruptcy of Arthur S. Boardman for $692.50, alleged to be the cash surrender value of a policy of life insurance held by Boardman when adjudicated a bankrupt. Writ dated July 15, 1901.

The defendant demurred to the declaration on the grounds stated by the court. The Superior Court sustained the demurrer; and the plaintiff appealed.

F. F. Haskell, pro se, submitted a brief.

G. R. Nutter, for the defendant.

KNOWLTON, J. The defendant's demurrer to the declaration rests on two grounds, first, that it does not appear from the declaration that the policy has a cash surrender value; and secondly, that there is no averment that the beneficiary in the policy has ceased to have an interest in it, or has agreed to surrender it.

The contract does not, in terms, give the policy a surrender value, and if it has such a value it is by reason of some statute in reference to which it was made. The contract is to be performed in New York, but the declaration does not state nor from any of the writings does it plainly appear where it was made. If it was made in Massachusetts and is to be governed by the laws of this Commonwealth, it has no cash surrender value, because our statutes do not provide for a cash surrender value when the policy is issued by a foreign corporation. The statutes touching this subject relate only to domestic corporations. Sts. 1887, c. 214, § 76; 1894, c. 522, § 76; 1900, c. 363, § 3. R. L. c. 118, §§ 76–82.

If the policy was made in New York and is governed by the laws of that State, there is no averment that there are any laws which give such a policy a cash surrender value. If there are such laws, they should be stated as facts. In the declaration there is an averment that the "said policy was an asset, it having at the time a cash surrender value of $692.50." But this is in the nature of a conclusion of law which the facts set out in the declaration do not warrant, and if in any sense it can be called a statement of fact, it is a statement of a deduction of

fact from primary facts which are not stated, and which on demurrer are necessary to be stated as a foundation for an action. *Everett* v. *Drew*, 129 Mass. 150. *Hollis* v. *Richardson*, 13 Gray, 392.

A policy of life insurance for the benefit of a third person named in it cannot be surrendered without the consent of the beneficiary. *Gould* v. *Emerson*, 99 Mass. 154. *Pingrey* v. *National Ins. Co.* 144 Mass. 374. *Central Bank of Washington* v. *Hume*, 128 U. S. 195. R. L. c. 118, § 76.

By the terms of the policy, if the assured died within twenty years from its date the company was to pay the amount of the policy to his mother, if living, or if she were dead, to his estate. At the expiration of twenty years, if he survived so long, they were to pay it to him. He had a valuable interest in the policy at the time of his bankruptcy, which passed to his trustee. *In re Boardman*, 103 Fed. Rep. 783. See also *In re Steele*, 98 Fed. Rep. 78. *In re Slingluff*, 106 Fed. Rep. 154.

But the contingent right of the beneficiary in an endowment policy of this kind is also a valuable right of which he cannot be deprived without his consent. *Pingrey* v. *National Ins. Co.* 144 Mass. 374. See *In re Diack*, 100 Fed. Rep. 770. Inasmuch as the declaration does not show that the beneficiary has consented to a surrender of the policy, the defendant is not liable to the plaintiff in this action, even if the policy has a cash surrender value.

Judgment for the defendant.

COMMONWEALTH *vs.* CORNELIUS WHIPPLE & another.

Suffolk. March 10, 1902. — May 20, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Witness, Waiver of privilege. *Evidence*, Relevancy. *House of Ill Fame.*

At the trial of a man and woman on a complaint for keeping a house of ill fame, the man testified on direct examination that he was the husband of the other defendant. On cross-examination he testified, against his objection, that at the

time of his marriage to the defendant he was married to another woman still living from whom he had not been divorced. *Held*, that the cross-examination properly was allowed; that the witness by testifying in his own behalf had submitted himself to cross-examination on all matters relevant to the issue, and that the question whether the two defendants were married or not was relevant to the issue, and therefore the evidence was competent, even if it was not also competent for the purpose of showing the actual relation between the two defendants with a view to repelling any presumption of coercion that might arise if the woman defendant was the wife of the other.

MORTON, J. This is a complaint against the two defendants for keeping a house of ill fame. At the trial the defendant Cornelius testified on direct examination that he was the husband of the other defendant. Thereupon on cross-examination he was asked the questions that were objected to, namely: if his first marriage to the female defendant was his second marriage, to which he answered "Yes"; if at the time of his second marriage his first wife was living, to which he answered "Yes, he supposed so"; if at that time the first wife had obtained a divorce, to which he answered "No"; if he knew this at that time, to which he answered "Yes"; and if he had seen his first wife since his second marriage and living with his second wife, to which he answered "Yes; the last time about five years prior to the time of this trial." It is admitted that a defendant by testifying in his own behalf submits himself to cross-examination in all matters relevant to the issue. We think that the question whether the two defendants were married or not was revelant to the issue and that therefore this evidence was competent. It is possible that it was also competent, as the Commonwealth contends, for the purpose of showing what the actual relation between the two defendants was with a view to repelling any presumption of coercion that might arise if the female defendant was the wife of the other defendant; though it is to be observed that a married woman can be indicted or complained of alone for keeping a house of ill fame and that the ordinary presumption of coercion from the presence of the husband does not arise in such a case. *Commonwealth* v. *Lewis*, 1 Met. 151.

Exceptions overruled.

J. E. Young, (*J. W. Hathaway* with him,) for the defendants.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth, submitted a brief.

CORNELIUS E. COLLINS *vs.* NATHAN D. PRATT, administrator.

Middlesex. January 7, 1902. — May 21, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Landlord and Tenant. Assignment. Contract, Implied. *Frauds, Statute of.*

The acceptance of an assignment under seal of a lease makes the assignee liable for the rent reserved in the lease without his entering upon the land.

An assignor of a lease, who has been compelled by the lessor to pay the rent, has a right of action against his assignee, under seal, in the nature of the claim of a surety for money paid to the defendant's use, and the statute of frauds has no application.

CONTRACT by a lessee against the administrator of the estate of his assignee of the lease to recover rent and costs paid by the plaintiff in an action brought against him by the lessors. Writ dated November 3, 1899.

The answer contained a general denial and also set up the statute of frauds.

At the trial in the Superior Court before *Stevens*, J., without a jury, the defendant requested the judge to rule, that the mere acceptance by the defendant's intestate of an assignment of the lease, whether the assignment was under seal or not, in the absence of any evidence that the defendant's intestate or the plaintiff ever occupied the premises or had the beneficial use thereof, would not create such privity of estate as would entitle the lessors to maintain an action against the defendant's intestate for the rent reserved under the lease, and that the judge therefore must find for the defendant.

The judge refused to make this and other rulings requested by the defendant. He found for the plaintiff, and also found that the assignment of the lease, which was not produced in court, was under seal. The defendant alleged exceptions.

J. J. Devine, for the defendant.

W. L. Harris, for the plaintiff.

LATHROP, J. The right of the plaintiff to recover in this action depends upon whether the lessor of the plaintiff could have maintained an action against the defendant's intestate, who was

the assignee of the lease by an assignment under seal, and who did not enter upon the land.

It must be considered as settled law in England that an assignee of a lease who has accepted it is liable for rent, whether he has entered into possession or not. *Pilkington* v. *Shaller*, 2 Vern. 374. *Stone* v. *Evans*, Peake, Add. Cas. 94. *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238, where the matter is elaborately discussed by counsel and considered by the court. This case expressly overrules *Eaton* v. *Jaques*, 2 Doug. 455. The law is so stated in all the late English text books. Fawcett, Land. & Ten. 401. Foa, Land. & Ten. 320. Woodfall, Land. & Ten. (16th ed.) 273.

The English rule seems generally to have been followed in this country. Taylor, Land. & Ten. (8th ed.) § 450. 18 Am. & Eng. Encyc. of Law, (2d ed.) 672, n. 6.

In this Commonwealth, the precise question in the case before us has not been much considered; but we find nothing in the cases in which the liability of an assignee for rent has been discussed which leads us to suppose that an entry is necessary. Thus in *Howland* v. *Coffin*, 12 Pick. 125, where an action of debt for rent was brought by an assignee of the lessor against one who had "purchased" all the rights which the lessee had in the premises, it was said by Mr. Justice Wilde: "The action is founded on a privity of estate between the parties. The defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of rent ran with the land and by the assignment of the term became binding on the defendant."

In *Blake* v. *Sanderson*, 1 Gray, 332, the action was by the lessors against the assignee of a lease, and it was said by Mr. Justice Thomas: "By such assignment and acceptance of the lease, the defendant is bound to the performance of its conditions; and his liability for rent is to be governed by the terms of the lease, and not restricted to actual occupation."

Simonds v. *Turner*, 120 Mass. 328, is cited in some text books as authority for the position that an entry by the assignee is not necessary. The action was brought by the lessor against an assignee to recover a betterment assessment paid by the lessor. It does not appear from the case as reported nor from the plain-

tiff's exceptions, which we have examined, whether the assignee had made an entry or not. The defendant took the point on his brief, that, as this fact did not appear, the defendant was not liable. The opinion of the court was delivered by Chief Justice Gray, who, after holding that the betterment assessment was included in the covenant of the lease, and that the assignment had been accepted, held the assignee liable, citing *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238, and *Weidner* v. *Foster*, 2 Penn. 23, in both of which cases an entry by the assignee was held not necessary to be proved in order to bind him.

We are of opinion that these cases show that an entry by an assignee need not be proved; and we should reach the same result, were the question an entirely new one here. An examination of the English cases shows that the difficulty there arose from the fact that the old forms of a declaration in such a case set forth an entry, and the question was whether this must be proved. We do not think, after the long discussion of this question in *Williams* v. *Bosanquet*, *ubi supra*, that the matter is one of substance.

The case on which the defendant chiefly relies is *Sanders* v. *Partridge*, 108 Mass. 556. But in that case the assignment was not under seal, and while this was held to operate as a transfer of the lease, and to render the assignee liable for rent during possession, it was further held that he could not escape liability by making a formal assignment without changing possession. The case differs essentially from the one at bar.

As the lease was for one year only, neither it nor the assignment needed to be recorded. Pub. Sts. c. 120, § 4.

There was sufficient evidence in the case to show an acceptance of the assignment.

The statute of frauds is set up. The liability of the defendant's intestate is raised by his acceptance of the written assignment, and as between himself and the plaintiff is the primary liability, the plaintiff being in the position of a surety. The plaintiff having been compelled to pay, the law raises an obligation to indemnify him with which the statute of frauds has nothing to do.

Exceptions overruled.

RUFINA M. JORDAN *vs.* JAMES J. SULLIVAN.

Suffolk. January 20, 1902. — May 21, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Nuisance. Landlord and Tenant.

One who attends a meeting in a public hall at the invitation of a lodge whose members have hired the hall has no greater rights against the landlord than the members who invited him, and cannot maintain an action for injuries sustained because the entrance to the building was not a better one or because a gas jet should have been put in to light the landing at the foot of the staircase.

TORT for injuries caused by the plaintiff stumbling over a step at the entrance of the staircase leading to Arcanum Hall in that part of Boston called Jamaica Plain, against the owner of the building, alleging faulty construction and insufficient lighting. Writ dated October 12, 1898.

In the Superior Court *Maynard*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

I. R. Clark, (*G. F. Ordway* with him,) for the plaintiff.

L. M. Friedman, for the defendant.

LORING, J. This is an action for damages caused by falling over a step at the entrance of a flight of stairs leading to a public hall owned by the defendant. The hall had been let for the installation of a new lodge of the New England Order of Protection. Whether the plaintiff came to the hall for her own curiosity and convenience, as the plaintiffs did in *Plummer* v. *Dill*, 156 Mass. 426, and *Coupe* v. *Platt*, 172 Mass. 458, or as an invited guest is not plain; but, in our opinion, that is not material. The hall was up one flight of stairs and was reached from the street by going through a vestibule to a landing, called in the bill of exceptions an inner hall, and then up a flight of stairs. The floor of the landing was one step higher than the floor of the vestibule. The inner door of the vestibule was on the outer edge of the floor of the landing and opened out into the vestibule. The outside door of the vestibule also opened outward.

The plaintiff got to the hall between seven and eight o'clock

on the evening of January 31. It was a stormy night and snowing heavily. There were no lights outside the outer door. It appeared that two persons went through the two doors before the plaintiff and that the doors closed, or were closed, after them. The plaintiff opened the outer door and found herself in the vestibule, which was entirely dark. She found the knob of the inner door by feeling for it, opened it, and without looking to see if there was a step up went straight along, fell over the step up, and broke her arm. She testified that she never had been to the hall before; that she did not know that the hall was upstairs, but "thought she was going into an entry and then into the hall." She did not look to see whether there was a step, because it was so dark she could not see, and "because she thought this hall was built like the hall of her own lodge." On the evidence it could have been found that it was really dark at the landing at the time in question even after the inner door had been opened. The only means provided for lighting the landing at the foot of the stairs came from one gas jet at the head of the stairs behind a portière. The rod of the portière was three and a half feet from the ceiling, and when it was drawn across the head of the stairs the only light coming to the landing was that which came through this three and one half foot space. This gas jet was lighted on the night in question, and there was evidence that at the time of the accident the portière was drawn wholly, or nearly wholly, across the head of the stairs.

It appeared by the agreement of hiring that the hall was to be heated and lighted by the defendant; it also appeared that the janitor of the building was present on the premises when the first member of the new lodge arrived there on the night in question. There was no other evidence on the question whether the entrance was in the control of the defendant or not. It is plain that the defendant was not in control of the curtain. The curtain was manifestly put where it was to shut off the stairs from an anteroom at the head of the stairs on the left from the main entrance to the hall, which was across the entry at the head of the stairs on the right. We are of opinion that *Roche* v. *Sawyer*, 176 Mass. 71, is decisive of the matter.

If the plaintiff was invited to the hall at all, it was as a guest

of the lodge which was to be installed. It is plain that the members of the lodge who hired the premises cannot be heard to say that the entrance was not a better one and that the construction should have been changed by putting up a gas jet to light the landing at the foot of the stairs. *Woods* v. *Naumkeag Steam Cotton Co.* 134 Mass. 357. *Lindsey* v. *Leighton*, 150 Mass. 285. And it was settled in *Roche* v. *Sawyer* that one who comes on the premises as an invited guest of the tenant comes in under the tenant and has no greater rights than he has.

The plaintiff in *Learoyd* v. *Godfrey*, 138 Mass. 315, did not enter on the common passageway on the invitation of the tenant alone, but he came there as a public officer in the discharge of his duty. As the passageway was one within the control of the defendant and was the way provided by him for access to the tenement let by him, to which the plaintiff's duty called him, the defendant was under the duty of using due care to make the way safe as against the plaintiff, even if it were necessary to change the construction, although he was not under such an obligation as against a tenant and those coming under the tenant's rights.

The plaintiff is not helped by *Oxford* v. *Leathe*, 165 Mass. 254. In that case the landlord was held liable for a defect which was on the premises when they were let, on the ground on which a landlord is liable for a nuisance which is on the premises when a lease is made, namely, on the ground that he has been paid for the very use of the property which has been made of it, and, having been paid for that, he is liable if it was defective when put to that use. The principle of that case is that the landlord is liable as well as the tenant. Whether the plaintiff would have a remedy against the lodge if she was invited by them is an open question. *Coupe* v. *Platt*, 172 Mass. 458. *Plummer* v. *Dill*, 156 Mass. 426. But it was held in *Roche* v. *Sawyer* that however it may be with the tenant, a landlord is under no greater liability to the guests of a tenant than he is to a tenant. And there is nothing here to show that the landlord contemplated the use of the hall by guests within the meaning of that word in cases like *Oxford* v. *Leathe*.

Exceptions overruled.

THOMAS J. READY *vs.* JOSEPH G. PINKHAM.

Essex. March 4, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Infant. Contract, Construction.

An infant on coming of age cannot affirm part of a contract without ratifying the whole of it.

The owner of a lot of land agreed to sell it to a minor and to build him a house upon it. The minor was to pay to the vendor a certain sum in cash and to give a mortgage for the balance of the purchase money to another person who was to furnish the money from time to time for building the house. These things were done, and the minor gave an assignment to the vendor of all the money to be furnished under the mortgage. When the house was completed the minor moved into it, then, coming of age, conveyed it to the plaintiff, telling him that there was a mortgage upon it which he did not consider valid, because he made it when a minor. The defendant, having acquired the mortgage, proceeded to foreclose it, and the plaintiff brought a bill in equity to restrain him from doing so. *Held*, that the transaction was all one contract, and that the minor on coming of age could not affirm part of it without ratifying the whole, and, having kept the land, could not avoid the mortgage given for the purchase money.

BILL IN EQUITY, filed October 19, 1899, by one claiming under G. Emerson Vaughn and by Vaughn himself to restrain the defendant from foreclosing a certain mortgage for $1,350 given by Vaughn when a minor.

In the Superior Court a demurrer of the defendant on the ground that Vaughn was joined improperly as plaintiff, having no interest in the bill, was sustained, with leave to amend, and the plaintiff amended his bill by striking out Vaughn as a party. Later, the case was heard by *Pierce*, J., who made a decree granting the injunction prayed for, and ordering the cancellation of the mortgage and the release of all claims thereunder. The defendant alleged exceptions.

J. H. Sisk, for the defendant.

J. F. Hannan & H. P. Moulton, for the plaintiff.

KNOWLTON, J. The transactions disclosed by this bill of exceptions seem to have been as follows: One Lewis was the owner of a lot of land. He made a contract with one Vaughn to sell him the land and to build a house upon it, for which

Vaughn was to pay a certain sum in cash and the balance by a mortgage for $1,350 upon the property. This mortgage was to be given by Vaughn to one Breed, who was to pay the money secured by it to Lewis from time to time, as the work of building went on. A deed from Lewis to Vaughn and a mortgage from Vaughn to Breed were made, both on the same date, and at the same time an assignment was made from Vaughn to Lewis of the money to be furnished by Breed under the mortgage. Vaughn was at that time a minor. Lewis built the house and Breed paid him the money secured by the mortgage. After the house was completed Vaughn moved into it, and more than five months after he became of full age he conveyed it to the plaintiff, telling him that there was a mortgage upon it which he (Vaughn) did not consider valid, because it was made when he was a minor. The mortgage was assigned by Breed to the defendant, and the plaintiff brings this bill to enjoin the defendant from foreclosing it.

If the contract for the sale of the lot from Lewis to Vaughn included a contract to erect a house upon it which was to be paid for in part by the mortgage to Breed, to secure him for money to be furnished to Lewis as the construction of the building proceeded, the mortgage was no different in legal effect as against Vaughn, from an ordinary mortgage given by a minor in part payment for real estate conveyed to him. It was voidable. If these several agreements were all parts of one transaction, it is of no consequence that the mortgage was made to Breed instead of to Lewis the grantor in the deed. *Smith* v. *McCarty*, 119 Mass. 519, 520. *Hazleton* v. *Lesure*, 9 Allen, 24. *Woodward* v. *Sartwell*, 129 Mass. 210.

If the deed and mortgage back were made at the same time and as parts of the same contract, Vaughn, after becoming of age, could not affirm a part of the contract by retaining and then conveying away the real estate, without ratifying also the other part by which he agreed to pay for it. *Badger* v. *Phinney*, 15 Mass. 359. *Boyden* v. *Boyden*, 9 Met. 519. *Chandler* v. *Simmons*, 97 Mass. 508. *Gibson* v. *Soper*, 6 Gray, 279. *Pelletier* v. *Couture*, 148 Mass. 269, 271. *Dana* v. *Coombs*, 6 Greenl. 89. *Robbins* v. *Eaton*, 10 N. H. 561. *Bigelow* v. *Kinney*, 3 Vt. 353. *Van Horne* v. *Crain*, 1 Paige Ch. 455.

The doctrine stated in *Gibson* v. *Soper* and in *Chandler* v. *Simmons*, *ubi supra*, that in order to avail himself of his right to avoid a contract a minor is not obliged to put the other party *in statu quo*, is not applicable to a case like the present, where a minor affirms a contract under which he retains and holds unimpaired, after attaining his majority, all the property covered by it.

The only question of doubt in this case is what construction to put upon the bill of exceptions. The bill appears to be drawn with an intention of presenting all the evidence bearing upon the questions of law, although it does not expressly state that there was no other material testimony. The testimony as to the making of the mortgage comes from Vaughn who was called by the plaintiff, and Lewis who was called by the defendant. There is no contradiction in their testimony, although Vaughn, testifying about the contract in cross-examination, seems to have been an unwilling witness for the defendant. The deed and the mortgage were both dated and signed the same day, and Vaughn gave an affirmative answer to the question, "It was practically one transaction, was it not? You signed this mortgage to Mr. Breed on July 21, 1896, and on that same day Mr. Lewis gave you the deed of the premises July 21, 1896?" He also said, "Lewis agreed to build the house for so much. I gave the mortgage for part payment." Lewis testified that the mortgage was made to him, and that the money was all assigned to him at the time the mortgage was given. He said, "Mr. Vaughn gave Mr. Breed orders to pay the money to me as the work progressed." Both testified that the contract to build the house was made at about the time the deed was given, and as the deed and mortgage were made and delivered at the same time, the contract for the house must have been a part of the previous arrangement. The bill of exceptions shows no finding of fact by the judge, but closes with a statement that he refused to rule as requested, "but did rule that the plaintiff was entitled to maintain said bill." Upon this uncontradicted evidence it is difficult to see how the judge could have failed to find that the deed and mortgage and contract to build the house were parts of one contract, and that the mortgage was given to secure the purchase money of the real estate in the condition in which Lewis agreed to put it. See *Sprague* v. *Brown*, 178

Mass. 220. We are inclined to construe the exceptions as presenting rulings of law on this undisputed evidence, rather than as founded on findings of different facts which nowhere appear.

Exceptions sustained.

HOWARD C. FORBES *vs.* ARTHUR E. APPLEYARD.

Suffolk. March 5, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Contract, Rescission.

The defendant, a promoter of electric lines with certain projects on hand, employed the plaintiff, an electrical engineer, at the rate of $2,500 a year to perform professional services in regard to certain of these projects one of which might require six months and another a year, the plaintiff mentioning at the time of his employment, that he already had undertaken to make a certain report which would require him to be away at a certain time for about a week. Later the plaintiff notified the defendant that he should have to go away for a little while to complete the report mentioned, whereupon the defendant wrote to him that if he intended to go "it would be better to take a leave of absence without pay for thirty days," as that would give him sufficient time to make his report without interfering with the defendant's business. The plaintiff informed the defendant that he did not consider the proposition in accordance with their agreement, but did not remember what answer the defendant made to this. The plaintiff went away, made his report and returned at the end of five days. He then had conversations with the defendant in regard to the work and expressed a willingness and desire to go on with it, but the plaintiff testified, that at this time the defendant still considered him on leave of absence. Later the plaintiff sued on an account annexed for services during this period, having been paid in full up to the time of his absence. *Held*, that as no definite time or no definite task was fixed by the contract, the defendant's insisting that the plaintiff's stipulated absence should take the form of a leave of absence without pay, if a breach of the contract, could not be treated by the plaintiff as a repudiation of it, and, even if it could have been so treated, the plaintiff had failed to exercise an election to rescind if he ever had it.

CONTRACT upon an account annexed amounting in all to $2,038.67 for professional services as an expert electrical engineer and for expenses. Writ dated March 1, 1901.

In the Superior Court *Hardy*, J. ordered a verdict for the plaintiff for two items only, amounting to $77.61; and the plaintiff alleged exceptions.

The bill of exceptions stated the following evidence in regard

to the contract between the parties and the facts relied upon by the plaintiff as constituting a breach on the part of the defendant: The plaintiff testified, that the defendant was a promoter, investor and contractor in connection with lines for electric lighting and electric street railways, that the plaintiff, being an electrical engineer, the defendant spoke to him of various projects he had on hand, asked him if he was in a position to go to Ohio, and offered him $2,500 a year for this work; that, under reasonable conditions, it would take perhaps six months to build a proposed road, and for a proposed power station possibly a year. The plaintiff, in reply, told him he could arrange to go to Ohio, but there were one or two things to be considered, and that the plaintiff would have to make a report for the Shawinigan Water and Power Company, which he had already contracted to do, and in which matter he had already made a preliminary report; that he stated to the defendant that this would take him away for about a week, the company being located ninety miles north of Montreal; that he further stated to the defendant that he was under obligation to the Boston Gas Light Company to continue to furnish it expert services in the matter of the subway explosion cases when they were reached in court, and that it was impossible to tell how long this would take; also, that for family reasons it would be necessary for him to be in Boston about January 1, 1901. The plaintiff testified, that after these conversations, on or about September 7, 1900, the arrangement was closed, and a few days later he started for Springfield, Ohio, and there and elsewhere performed various services. He further testified, that shortly before November 1 he notified the defendant that he should have to go away for a little while to complete the Shawinigan report, and that in reply he received a letter from the defendant dated October 30, 1900, as follows:

"In regard to your trip to Montreal I may say from what I have seen of the time it takes to make one of these reports, I think if you intend to go it would be better to take a leave of absence without pay for thirty days, as that would give you sufficient time to make your report without interfering with our business. This would be the only way that I should be willing that you should do this work.

"Under these circumstances you can commence your leave of absence with the first day of November, reporting back again the first of December. Of course, I would much prefer that you did not go, but as long as I said you might I feel that this will be the only satisfactory way for me to arrange it."

The plaintiff testified, that previous to this letter there never had been any talk of his being laid off for thirty days without pay; that the time actually taken in Canada in connection with this report was but three or four days, that the plaintiff's total absence on that account was not over five days, and that the plaintiff never agreed or assented to be laid off for thirty days without pay on this account; that the plaintiff immediately wrote the defendant from Ohio on November 1 as follows:

"I do not think your Montreal arrangement is best for the work out here, nor is it in accordance with my ideas of our understanding. I am under obligations to the Shawinigan people, however, as I have already been up there and given them a preliminary report, and promised them one of my complete reports as soon as their plant was in proper condition. I will come to Boston, therefore, and try and see you on Saturday."

The plaintiff testified, that he came to Boston and saw the defendant on November 3, and told him that he did not consider the defendant's proposition in accordance with the agreement; that he was obliged to go to Montreal and Shawinigan, and that he did not recollect what answer the defendant made; that he got back to Boston on Friday, November 9, and saw the defendant the next day; that they had a long conversation on the new signal system, and that the defendant submitted some papers to the plaintiff and wished his ideas upon them; that the plaintiff took them, looked them over, and the next day wrote the defendant a letter, giving him such an opinion; that in their conversations on November 10, the plaintiff told the defendant that he had finished the work in Montreal, that there was nothing further in that connection for him then to do, and that he was ready to do anything the defendant desired; that he saw the defendant several times up to December 12, and had conversations with him; that at these conversations the plaintiff told the defendant that the machinery for the new power station ought to be ordered, the designs made and the work started, and that

he, the plaintiff, stood ready to begin work at any time as soon as notified by the defendant; that the plaintiff had a telephone at his house and his office and was accessible at any moment; and that at these conversations the matter of the proposed power station was discussed.

The plaintiff further testified: "About the first of December I saw him again and the question came up of getting out and starting the plans of the power station, and getting out the specifications for machinery in order that there might be no delay when the machinery was needed. At that time Mr. Appleyard said he wanted me to take the whole thing off from his hands as he was too busy with other matters to give it any attention, and I then proceeded to, started to make preparations for drawing plans of the power station." He also testified, that they had some discussion as to where the work should be done; that the plaintiff made preparations by cleaning out an old room formerly used as a testing laboratory at his office, buying drafting tables, drawing materials, catalogues, etc., getting ready to begin drafting; that this was early in December, 1900. Referring to this time the plaintiff was asked: "What was the conversation you had that day with Mr. Appleyard?" and answered: "I told him I was going ahead with the plans of the power station, and wanted to consider the question of machinery that he had on hand, and, in general, had a consultation with him on the subject. I remember he still considered me on leave of absence."

F. N. Nay, for the plaintiff.

F. H. Williams, for the defendant.

HOLMES, C. J. This is an action upon an account annexed for services as an electrical engineer. The plaintiff's case is that he was employed by the defendant, and that the defendant broke the contract before it was completed. Therefore we assume that the suit is for a *quantum meruit*. See *Canada* v. *Canada*, 6 Cush. 15; *Simmons* v. *Lawrence Duck Co.* 133 Mass. 298, 300. On that footing the bill of particulars charges three items: professional services from September 8 to November 3, 1900, inclusive; like services on November 12, and again from December 5 to December 8, both inclusive. The other items were for expenses. At the trial, as we understand the evidence, it was not denied that the plaintiff had been paid for his services and

expenses up to November 1, and the judge, with the defendant's consent, directed a verdict for the plaintiff for the item of November 12 and for expenses incurred after November 1, and would not allow the plaintiff to go to the jury for anything more. The plaintiff excepted.

The course taken by the judge perhaps implied that the plaintiff might recover on a *quantum meruit* if the defendant had broken the contract, and in this, as a general proposition, there is no doubt that he was right. *Fitzgerald* v. *Allen*, 128 Mass. 232. *Cook* v. *Gray*, 133 Mass. 106, 111. *Simmons* v. *Lawrence Duck Co.* 133 Mass. 298, 300. *Goodman* v. *Pocock*, 15 Q. B. 576. *De Bernardy* v. *Harding*, 8 Exch. 822. *Bull* v. *Schuberth*, 2 Md. 38, 57. 2 Smith Lead. Cas. (10th ed.) 32, 40 *et seq.*, note to *Cutter* v. *Powell*. It will be noticed that the plaintiff did not seek to recover for loss of time or for anything except services actually rendered, so that the case does not present the question whether his rights with regard to such an item would be different in this action from what they would have been in a suit upon the contract. See *Goodman* v. *Pocock*, 15 Q. B. 576, 583, 584; *Johnson* v. *Arnold*, 2 Cush. 46; 2 Smith Lead. Cas. (10th ed.) 46. Therefore the most obvious question is whether there was any evidence of services from November 1 to November 3, or from December 5 to December 8. The defendant, it is true, denies that he made the contract in such form as to bind himself personally and that he broke it, but it is too plain for argument that there was evidence of personal liability for the jury, and we assume for the purposes of decision that there was some evidence of a breach.

We see no evidence that services were rendered during the times mentioned. On November 1 the plaintiff had notice that the defendant considered him on leave of absence for a month without pay, and at the time seems to have yielded a dissatisfied assent, although the defendant's taking this position now is relied on as the breach. In December the plaintiff says that the defendant still considered him on leave of absence. There is no evidence of work done during the earlier days in question, and nothing upon which a jury fairly could base a finding for December. Moreover, if the plaintiff after the breach relied upon, saw fit to do further work mutually understood to be under the con-

tract, he would be confined for his compensation to a suit upon the contract. *Hyland* v. *Giddings*, 11 Gray, 232.

We suppose, however, that the case is brought here upon a different and far more sweeping contention, although if we are right in our surmise the proposition is not developed very plainly. The plaintiff probably wanted to go to the jury for additional compensation for the time for which he had been paid, on the ground that the whole matter was set at large by the defendant's alleged breach of contract.

The plaintiff has not put himself in the position of rescinding the contract from the beginning. He has not returned or offered to return what he has received, but on the contrary has credited it, and, as he received the money under the contract, he must be taken to have credited it under the contract. How far this course is consistent with a *quantum meruit* for any services we need not consider. It hardly is consistent with the position which we are supposing now to be assumed. *Trecy* v. *Jefts*, 149 Mass. 211, 212.

But there are further difficulties which seem to us too great to be overcome. It may be admitted that in some entire contracts a breach on one side pending performance would warrant a rescission and a return of what had been received as preliminary to a recovery outside the contract for all that had been done. On the other hand, in other cases the entirety of the contract at the outset might not be sufficient warrant for that course. It might be apparent that performance and payment were so far set against each other as equivalent that the past could not be disturbed. See Langdell, Contracts, § 128. With regard to contracts of service broken after part performance, a doubt has been expressed by a very eminent judge whether there ever could be a rescission properly so called, or anything more than an emancipation of the servant from the contract for the future, as the past cannot be undone. Bowen, L. J. in *Boston Deep Sea Fishing & Ice Co.* v. *Ansell*, 39 Ch. D. 339, 365. However this may be, the contract in this case as stated by the plaintiff seems to us too indefinite and too nearly an employment at will to warrant the course which the plaintiff desired to pursue. He was not employed for a definite time or for a definite task. There were expectations expressed that a power station would be built. But

the plans were not made, and if nothing more was said than appears in the evidence, it cannot be questioned that the defendant was at liberty to change his mind if he saw fit. Under such circumstances the defendant's insisting that the plaintiff's stipulated absence on his own affairs should take the form of a leave of absence without pay, even if contrary to the earlier understanding, cannot be held to warrant the plaintiff in ripping up the whole period of his service and treating what was done and paid for as reopened for assessment by a jury. There is nothing to show that the defendant might not have dismissed him altogether. Furthermore the plaintiff is met by the further difficulty that he did not treat the contract as wrongfully ended by the defendant's course. The moment for him to treat the contract as repudiated, if ever, was on November 1, when he knew the defendant's position and answered him. But the plaintiff went on and did further work. His testimony shows that it was done or purported to be done under the contract. If he ever had an election he exercised it then.

Exceptions overruled.

JOHN F. NORTON *vs.* INHABITANTS OF BROOKLINE.

Norfolk. March 5, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Municipal Corporations. Fire Commissioner. Practice, Civil, Agreed facts.

If a fire commissioner of a town, who has authority to discharge a fireman at any time and again to employ him, stops his pay for a stated future period as a penalty for misconduct, such stoppage of pay is not a fine and legally may exceed the amount which the town is authorized to impose as a fine.

When a case is submitted to the Superior Court on agreed facts and no power is given to draw inferences, that court by its finding can add to the statement only such conclusions as the law implies. If a power to draw inferences is given, and is exercised by the Superior Court, this court will not revise the finding further than to decide whether the facts agreed furnished any warrant for the conclusion drawn.

CONTRACT against the town of Brookline for $61.25 alleged to be due the plaintiff for services as a member of the fire de-

partment of that town during one week from February 5 to February 12, 1900, and two weeks from August 20 to September 3, 1900. Writ in the Municipal Court of Brookline dated July 2, 1901.

On appeal to the Superior Court the case was heard on the following agreed facts: Before February 5, 1900, complaint having been made against the plaintiff for leaving his horses while in the discharge of his duty, and attempting to assault a motorman, a hearing was given by the fire commissioner on January 27, 1900, at which the plaintiff was present; and the fire commissioner found that the plaintiff was in the wrong, and notified him that he would lose a week's pay. The plaintiff made no objection of any kind, and continued to perform his duties as usual.

Thereafter before August 20, the plaintiff having been complained of by the assistant chief for intoxication, another hearing was given him by the commissioner on August 18, 1900, at which he was present and admitted the charge. The commissioner thereupon notified him that he would lose two weeks' pay, be reduced to the ranks from the position of lieutenant which he then held, and be transferred to another station. The plaintiff made no objection to the loss of pay, but asked for remission of the loss of his rank, which was not granted.

The plaintiff thereafter continued to serve as a member of the fire department, until he resigned at the suggestion of the fire commissioner, on or about May 14, 1901, and made no claim for the pay in question until after his resignation.

No question was raised by the plaintiff as to the fairness of the hearings, or the merits of the charges, but his contention was that these amounts were fines, which the fire commissioner had no right to impose, and that therefore the sums declared forfeited were due to him.

It was further agreed, that the fire commissioner was the head of the fire department, and as such had the right to employ such persons as might be required for that department, to determine their duties, and to discharge them at any time for cause which he deemed sufficient. St. 1899, c. 135.

The plaintiff served as a member of the fire department for about two years and during all the time of his employment, and subsequently, it had been the custom of the department, with

which the plaintiff was familiar, instead of discharging men for minor offences, to stop their pay for short periods at a time.

If upon the above facts the plaintiff was entitled to maintain this action, judgment was to be entered in his favor for such amount as he might be entitled to and costs; otherwise, judgment was to be entered for the defendant, with costs. The Superior Court gave judgment for the defendant; and the plaintiff appealed.

J. F. Quinlan, for the plaintiff.

W. D. Turner, for the defendant.

HOLMES, C. J. This is an action by a former member of the fire department to recover pay stopped by the fire commissioner for misconduct. It was submitted to the Superior Court on agreed facts, and judgment was rendered for the defendant. The plaintiff appeals. The single ground of the action is that the stoppage of pay was a fine and of greater amount than the fire commissioner was authorized to impose. St. 1899, c. 135. Pub. Sts. c. 35, §§ 32, 36; c. 27, § 15. *Tyng* v. *Boston*, 133 Mass. 372.

The plaintiff was employed on an indefinite contract, subject, it is agreed, to discharge at any time for cause which the fire commissioner deemed sufficient. St. 1899, c. 135, § 1. In *Tyng* v. *Boston*, as appears by the papers in the case, the pay which the fire commissioners declared forfeited was pay which already had become due, whereas in this case the forfeiture was notified before the services were rendered for which the pay is claimed; but still it may be argued that the character of the forfeiture is not changed by that circumstance. It may be said that the plaintiff was employed under one continuing contract, *Savoy* v. *Dudley*, 168 Mass. 538, *Gandy* v. *Jubber*, 9 B. & S. 15, 18, that to deprive the plaintiff of his rights under it stands on the same footing when those rights accrue after the announcement as when they accrue before, and that practically the plaintiff was under the necessity of rendering the services or of losing his place and therefore cannot fairly be treated as having assented to the forfeiture if it was of a kind that ought not to be imposed. See *Malcolm* v. *Boston*, 173 Mass. 312.

We feel the force of the argument for the plaintiff, but we are of opinion that it is not entitled to prevail. In this, as in

so many other cases, the line of distinction between two principles which impinge upon each other is likely to have a technical look when regarded by itself. But a line is the necessary result of the admission of the two principles and of their difference, and its precise place of incidence necessarily will depend upon comparatively nice considerations. In this case we assume for the purposes of argument that the fire commissioner could not have imposed this forfeiture as a fine. On the other hand, as we have said, he had power to discharge the plaintiff at any time. The statute also gave him power to appoint such firemen as he deemed necessary. Therefore he might have discharged the plaintiff and afterwards have allowed him to serve, and, so far as appears, to serve as a volunteer in the hope of re-employment. But that is the substance of what happened, although it was not drawn out into a formal expression. While treated as one contract so long as nothing happens to make a change, the later employment being "a springing interest arising upon the first contract and parcel of it," 9 B. & S. 18, an employment of this sort, which is terminable at any time, is subject to modification at any moment by either party as the condition of its continuing at all. See *Preston* v. *American Linen Co.* 119 Mass. 400, 404; *Lamson* v. *American Axe & Tool Co.* 177 Mass. 144. It even may be split up when justice requires, for instance, to allow a plaintiff to recover for his work until the time had run out during which he lawfully was employed by an agent, although he had worked continuously for a longer time. *May* v. *Gloucester*, 174 Mass. 583, 585. See *Attorney General* v. *Equitable Accident Ins. Association*, 175 Mass. 196, 199.

It is said that the fire commissioner had no authority to change the terms of the plaintiff's employment. Nothing appears except the statute to which we have referred, and the fact that the town in its defence of this action is adopting his act. We cannot assume that the defence set up is unauthorized. It is said further that it does not appear that the plaintiff knew his rights when, as it is expressed, he waived them. What happened, as we have said, was in substance that he was given his choice between being discharged and going on for a time without pay. Undisclosed ignorance of the law on one

side could make no difference in the operation of a waiver, properly so called. It certainly makes no difference in the validity of a contract or in the effect of rendering services purporting to be rendered gratuitously. It is equally immaterial what the plaintiff may have intended so long as it was not disclosed. *Bohn Manuf. Co.* v. *Sawyer*, 169 Mass. 477, 482. *Hobbs* v. *Massasoit Whip Co.* 158 Mass. 194, 197. *McCarthy* v. *Boston & Lowell Railroad*, 148 Mass. 550, 552. *West* v. *Platt*, 127 Mass. 367, 372.

A fine is imposed upon a person generally, and if valid may be collected from his property so far as it is subject to his personal obligations. In *Tyng* v. *Boston*, if the stoppage of the plaintiff's pay was lawful, a suit against him would have been an alternative remedy. Here there was no attempt to impose such an alternative liability. There was an announcement to the plaintiff that if he saw fit to remain he must remain at one time for a week, at another for two weeks, at gratuitous service, with liberty to remain thereafter on the terms of again drawing pay. We are of opinion that the fire commissioner is not shown to have exceeded his power.

A mistaken argument for the defendant leads us to add that when a case is submitted on an agreed statement of facts, if no power is given to draw inferences the Superior Court has no greater power than this court. It can add to the statement only such conclusions as the law implies. If a power to draw inferences is given, then of course it may be exercised by the Superior Court, and this court will not revise the finding further than to decide whether the facts agreed furnished any warrant for the conclusion drawn.

Judgment affirmed.

EDWARD E. BROWN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 6, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Negligence, Contributory, on railroad.

A passenger about to alight from a train, who goes back for his umbrella which he left in the seat and returning steps off the platform of the car after the train has started without looking to see whether it has started or not, is not in the exercise of due care.

TORT for injuries caused by the plaintiff falling by reason of the alleged negligence of the defendant in starting its train while the plaintiff was alighting therefrom at North Abington. Writ dated August 24, 1899.

At the trial in the Superior Court before *Hopkins*, J., the plaintiff testified that he was sixty-three years of age, and had lived in North Abington since 1865; that his business since 1892 had been that of a real estate broker with an office in Boston; that during the last thirty-five years he had travelled back and forth almost daily on the defendant's railroad; that on August 10, 1899, the date of the accident, he took the train on the defendant's road at Boston, at 5.18 P. M., bound for North Abington, and occupied a seat in the smoking car, which was the car directly behind the engine, his seat being about one third of the way toward the front door from the rear door; that he played whist with three companions during the greater part of the way to North Abington, where the train arrived at about 5.45 P. M.; that shortly before the train arrived at North Abington he stopped playing, and, as he came to the station, got up to get his bundles from the rack, and after gathering his bundles walked to the rear end of the car, where from the door he saw that it was raining. He saw the brakeman on the forward end of the following car, and seeing it raining reminded him of his umbrella which he had left in his seat. He spoke to the brakeman, whom he knew, saying, "Hold on, Jim. Let me get my umbrella." The brakeman replied, "All right, go ahead." The

plaintiff went back after his umbrella, but before he got as far as his seat he saw a friend of his, one Connolly, going out of the forward end of the car with his umbrella, and at the same time an acquaintance of the plaintiff informed him that Connolly had taken his umbrella for him. The plaintiff at once walked back to the rear end of the car, stepped out on the platform, and the brakeman was there, and testified: "I deliberately walked from the platform of the car down the steps, and stepped off from the step on to the platform of the depot, and the next thing I knew — I would not say whether it was the wooden platform or the gravel part platform, because it was so dark I could not see — the next thing I knew Mr. Donald picked me off the ground." The plaintiff also testified, that when he stepped off the car steps to the platform he fell, because instead of stepping upon the platform from a stationary train, as he supposed, he had stepped from a moving train. "*Q.* When you stepped off the step did you know the train was moving? *A.* I did not, sir; had no more idea of it — it was the furthest from my mind." The plaintiff testified, that "it was a dark, drizzly evening."

At the close of the plaintiff's evidence, the judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

S. L. Whipple, (*F. Rogers* with him,) for the plaintiff.

C. F. Choate, Jr., for the defendant.

KNOWLTON, J. The plaintiff on August 10, 1899, took the defendant's train from Boston to North Abington, where he arrived at forty-five minutes after five o'clock in the afternoon. He started to alight from the train, and on reaching the door of the car discovered that he had left his umbrella in his seat and went back for it. He found that it had been taken out by his friend at the other end of the car, and, returning to the door from which he had gone back, he stepped out upon the platform of the car and got off after the train had started. He fell and was injured, and now seeks to recover compensation for his injury.

We do not consider the question whether there was negligence on the part of the brakeman or conductor in allowing the train to start before the plaintiff had alighted, for we are of opinion that there was no evidence that the plaintiff was in the exercise of due care in getting off as he did. It is a general

rule that a passenger who attempts to get on or off a railroad train while it is in motion, is not in the exercise of due care. *Merritt* v. *New York, New Haven, & Hartford Railroad*, 162 Mass. 326, and cases there cited. The question in a case like the present is whether there is evidence that takes it out of the general rule.

The plaintiff was very familiar with the place. For nearly thirty-five years he had travelled back and forth by train nearly every day between North Abington and Boston. When he alighted there was no person in his way and nothing to obscure his vision. Although he says it was a dark, drizzling evening, daylight had not gone, for a quarter before six o'clock on August tenth is a long time before sunset. There was a kerosene light ten or twelve feet from where he stepped off, under the roof which covered the platform, and he testified that he could have seen it if he had looked around. There was also a truck on the platform nearly opposite the place where he stepped off, which he saw while he was on the platform of the car. He testified that his sight was good, and there was nothing to distract his attention as he was getting off. He also testified that he did not look to see if the train was moving; that he did not look at all, but got off the train without looking. If the plaintiff knew that the train was moving when he stepped down from it, he was not in the exercise of due care and he cannot recover. If he did not know it, there is no evidence that he was in the exercise of due care in getting off without knowing it. The evidence tends to show that if he had paid any attention to the familiar surroundings he could not have failed to notice that the train had started. To say nothing of the platform and other objects, the truck which he saw while he was on the platform of the car would have shown him that the train was in motion if he had looked; so would the kerosene light; but he chose to get off without looking or paying attention to the train or his surroundings. The circumstances disclosed by the evidence have no tendency to show that he would have failed to discover the movement of the train if he had been in the exercise of ordinary care. Indeed, they indicate that the accident happened because he used no care. While the burden was on him to prove that he was carefully trying to alight safely, he fails to show that he was

giving any attention to his surroundings. The case is not like *Brooks* v. *Boston & Maine Railroad*, 135 Mass. 21. It differs materially in its facts from *Merritt* v. *New York, New Haven, & Hartford Railroad*, 162 Mass. 326. In principle it is more like *England* v. *Boston & Maine Railroad*, 153 Mass. 490.

Exceptions overruled.

HERBERT MAYNARD & another *vs.* HIRAM WEEKS & others.

Suffolk. March 6, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Contract, Construction, Implied. *Agency.*

The plaintiffs were commission merchants in Boston selling lemons upon a commission as agents of a Malaga house. Having procured from the defendants an order for Malaga lemons, they sent them a contract in writing addressed to the defendants and signed by the plaintiffs as follows: "We confirm sale made to you viz. [terms of sale.] Shipment about 20th inst. In our cable to Messrs. G. & Co. we stated that quality must be strictly choice and free from spots. It is understood that we act simply as agents in this transaction, and that all risks incident to the importation are yours and not ours. Payment net cash on arrival." The plaintiffs, having a letter of credit with G. & Co., allowed G. & Co. to draw on them for the price of the lemons to be repaid to the plaintiffs by the defendants on the arrival of the lemons. Upon arrival the lemons were not in accordance with the contract and the defendants refused to take or pay for them. They were sold at auction, and the plaintiffs sued for the difference between the sum realized and the stipulated price, as expenses of importation paid by the plaintiffs to the defendants' use. *Held*, that the rights of the parties must be adjusted by the contract in writing, and that by its terms the plaintiffs were not agents of the defendants nor lenders to them of funds equal to the contract price, and that the only obligation of the defendants was to pay for the lemons if on their arrival they were in accordance with the contract. The "risks incident to the importation" which were to be borne by the defendants did not include the risk that the lemons when sold in Malaga should not comply with the description in the contract.

CONTRACTS with counts in special contract, for money paid and work done, and on an account annexed. Writ dated November 17, 1900.

At the trial in the Superior Court before *Hardy*, J., neither party desired to go to the jury on any issue, and the judge ruled that there should be a verdict for the plaintiffs. He so directed,

and damages were assessed in the sum of $1,422.42. The defendants alleged exceptions.

S. H. Tyng, (*T. J. Kenney* with him,) for the defendants.

G. R. Nutter, (*J. G. Palfrey* with him,) for the plaintiffs.

BARKER, J. The plaintiffs were commission merchants at Boston and sold lemons upon a commission as agents of a Malaga house. The defendants were dealers in Boston. The plaintiffs without disclosing the name of their principal solicited an order for lemons from the defendants and after personal interviews and talks over the telephone an oral order was given to the plaintiffs and cabled by them to their principal, and thereupon the plaintiffs wrote to the defendants as follows: "We enclose contract in duplicate. Kindly sign duplicate and return to us. Thanking you for the order and trusting that it may be the forerunner of a larger business with your good selves we are," etc.

The duplicate enclosures in this letter were of the following tenor:

"Boston, Sept. 15, 1900. Messrs. Foster, Weeks & Co., Boston, Mass. Dear Sirs, — Malaga lemons. We confirm sale made to you, viz., 600 boxes half 300 size, half 360 size. Price $2.62½ per box in bond, ex dock Boston. Shipment about 20th inst. In our cable to Messrs. Frederico Gross & Co. we stated that quality must be strictly choice and free from spots. It is understood that we act simply as agents in this transaction, and that all risks incident to the importation are yours and not ours. Payment net cash on arrival. Yours very truly, Maynard & Child."

On receipt of the letter enclosing the duplicate contracts the defendants asked by telephone what the contract meant and upon receiving an answer signed the contract. The lemons arrived in Boston and upon examination of them the defendants refused to accept them and declined to pay the plaintiffs anything. It is conceded by the plaintiffs that the lemons never answered the description stated in the contract.

The plaintiffs' evidence tended to show that they had with Frederico Gross and Company a letter of credit issued by Boston bankers authorizing Gross and Company to draw for the price of the lemons and that their arrangement with the defendants was to lend to the latter the use of this credit to the extent of

the price of the lemons, until their arrival at the dock in Boston and that upon such arrival of whatever lemons should be shipped upon the order the defendants were to pay to the plaintiffs the price mentioned in the contract as compensation for their loan of the credit and their services to the defendants in the transaction.

After the defendants' refusal to accept the lemons they were sold at auction and the plaintiffs seek to recover the difference between the sum realized upon the sale and the price stipulated in the contract.

We think that the rights of the parties must be adjusted upon the terms of the written contract. Upon those terms the plaintiffs were not agents of the defendants, nor lenders to them of funds represented by the contract price, and no other obligation was imposed upon the defendants than to accept and pay for the lemons on their arrival if when sold at Malaga they corresponded to the description given in the written contract of the goods sold. The risk that the goods when sold in Malaga should not correspond to that description was not a risk "incident to the importation" within the terms of the written contract. If the goods had been of the description stated in the contract when sold in Malaga all subsequent risks affecting them would have been "risks incident to the importation," and the defendants would have been bound to accept and pay for them on arrival notwithstanding subsequent deterioration for any cause. As they were not of that description when sold the defendants are not liable to the plaintiffs upon the contract. The ordering of the verdict for the plaintiffs was wrong.

Exceptions sustained.

THORNTON W. SARGENT *vs.* AMOS W. STETSON.

Suffolk. March 6, 7, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Kansas. Corporation. Practice, Civil, Amendment, Equitable defence. *Limitations, Statute of.*

Under the law of Kansas, it is a good equitable defence to an action to enforce a stockholder's liability under the statutes of that State, that the defendant purchased in good faith and for full value exceeding in amount his liability a note guaranteed by the corporation, and the fact that the note and the mortgage securing it were not transferred to the name of the defendant is immaterial.

In an action to enforce against a resident of Massachusetts a statutory liability as a stockholder of a Kansas corporation, the defendant set up as an equitable defence, that he purchased for full value exceeding in amount his liability a note guaranteed by the Kansas corporation. It was contended by the plaintiff that this note was barred by the statute of limitations. *Held*, that the equitable defence did not depend on the defendant's right to maintain an action at law against the corporation, but were it otherwise, a suit on the note would not be barred by lapse of time because, first, the Kansas statute of limitations has no force here, and secondly, our statute of limitations does not run in favor of a foreign corporation which could not be sued in this Commonwealth.

The fact that a defendant has pleaded in set-off as the holder of a certain note is no reason for refusing to allow him to amend his answer by setting up an equitable defence, averring payment of the note by him in discharge of a guaranty thereon.

CONTRACT by the holder of four bonds of the Davidson Investment Company for $3,500 in all, to enforce the liability of the defendant under Gen. Sts. of Kansas of 1889, ¶¶ 1200, 1204, as the holder of twenty-five shares of $100 each of the capital stock of that company. Writ dated March 6, 1900.

The answer among other matters pleaded in set-off a claim upon a certain note for $2,000 and interest guaranteed by the Davidson Investment Company and alleged to be owned by the defendant. By an amendment to the answer the defendant set up equitable defences, consisting of equitable ownership of the note alleged to have been purchased by him for $3,080, and also the alleged discharge of the guaranty of the Davidson Investment Company by such payment of the defendant.

In the Superior Court *Gaskill*, J. refused the plaintiff's requests for rulings, and found for the defendant. At the

request of the plaintiff, he reported the case for the consideration of this court. If the finding was warranted upon any ground properly raised by the pleadings, and upon the evidence properly admitted, it was to stand; otherwise, judgment was to be entered for the plaintiff for $2,500 and interest at six per cent from the date of the writ, or such other order was to be made as justice might require.

By the report, it appeared, that the defendant, being a family friend of one Mrs. Kingman and executor under her husband's will, bought for her the note in question secured by a Kansas mortgage and guaranteed by the Davidson Investment Company, she sending him her check for $2,000 to pay for it. Later, the investment having become nearly or quite worthless, he took it off her hands, and gave her in place good bonds for $2,000, which cost him that amount and afterwards sold at a premium. The note and mortgage were not transferred to the defendant's name, and he had foreclosure proceedings prosecuted in Kansas in the name of Mrs. Kingman. The proceedings resulted in a foreclosure sale, from which the amount realized was not enough to pay the expenses of foreclosure.

W. R. Bigelow, for the plaintiff.

H. M. Aldrich & E. G. McInnes, for the defendant.

KNOWLTON, J. The only question in this case is whether the finding in favor of the defendant was warranted by the evidence. There is no dispute that the defendant is liable to the plaintiff as a stockholder of the Davidson Investment Company, a Kansas corporation, unless he can maintain his defence that he is entitled to be relieved from liability by reason of his payment to Mrs. Kingman of the amount of a note and mortgage held by her as an investment and guaranteed by this corporation. The evidence well warranted a finding that he paid her the full face value of the note and mortgage, and that he took it in good faith, and was equitably entitled to have the benefit of it in some proper way as a claim against the corporation, or as representing a payment made by him of a debt for which the corporation was liable. In his pleadings he claims the benefit of his payment as an equitable defence under the laws of Kansas, and under our St. 1883, c. 223, § 14 (R. L. c. 173, § 28); and to meet any possible view of the evidence, he

makes two statements of his claim, in one averring his equitable ownership of the note, and in the other relying on his payment of a debt of the corporation, which to that extent should relieve him from liability as a stockholder. We think that the case of *Broadway National Bank* v. *Baker*, 176 Mass. 294, 298, and the decisions in *Abbey* v. *Long*, 44 Kans. 688, *Pierce* v. *Security Co.* 60 Kans. 164, *Kendall* v. *Underhill*, 8 Kans. App. 521, and in other Kansas cases, entirely justify the finding of the judge upon the evidence. The defence relied on is not technically a set-off against the plaintiff's claim, but it is a condition which equitably ought to relieve, and under the decisions of Kansas does relieve, a defendant from his liability as a stockholder on debts of the corporation, either when he holds against the corporation a debt which he bought in good faith at its face value of an amount equal to or greater than his original liability, or when he has paid such a debt for the benefit of the corporation and has received nothing in reimbursement.

The fact that there was no formal assignment of the note or mortgage is immaterial. It is the defendant's equitable relation to the corporation in reference to its debts, not his right to sue in an action at law, which gives him his defence against the plaintiff.

As the defence of the statute of limitations is not available to the defendant in answer to the plaintiff's claim from him as a stockholder (*Broadway National Bank* v. *Baker*, 176 Mass. 294, 297), so the statute of limitations does not deprive the defendant of his right to set up his equitable ownership of the note, or his payment of the note, as a condition affecting his alleged liability as a stockholder. If his right depended on the prosecution of the suit he would not be barred by lapse of time, because first, the statute of limitations in Kansas has no force here; and secondly, our statute of limitations does not run in favor of a foreign corporation which could not be sued in this Commonwealth. *Rockwood* v. *Whiting*, 118 Mass. 337. But as we have already said, his defence does not depend on his right to maintain an action at law against the corporation. It depends on facts and conditions which are to be considered from an equitable point of view, in determining whether he is now liable as a stockholder.

The plaintiff's contention that the amendment to the defendant's answer could not be allowed because his plea of set-off was a final election which prevented him from afterwards averring a payment is not well founded. There is no good reason why he should not be permitted to make both averments. R. L. 173, § 34. *Jewett* v. *Locke*, 6 Gray, 233. *Lyons* v. *Ward*, 124 Mass. 364.

Judgment on the findings.

MOLLIE R. COLE *vs.* CITY OF BOSTON.

Suffolk. March 7, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Evidence. Damages. Practice, Civil.

At the trial of a petition for an assessment of damages from the limitation of the height of buildings on and near Copley Square in Boston by St. 1898, c. 452, a witness for the petitioner, having testified to the price at which adjoining land recently had sold, was not allowed to testify that the price of such adjoining land had been adversely affected by the passage of the act. *Held*, that the evidence properly might be excluded; for, although the price of the adjoining land was competent, an inquiry into the considerations determining that price would open a collateral investigation.

At the trial of a petition for an assessment of damages from the limitation of the height of buildings on and near Copley Square in Boston, the judge instructed the jury, that if they found that the petitioner's property was worth as much the day after the act was passed as it was the day before, they should find for the city. The petitioner did not ask the judge to state to the jury that only special benefits could be offset and not those shared by the public. *Held*, that if the petitioner had wanted more explicit instructions, he should have asked for them, and, having failed to do so, could not object to the charge for not containing them.

PETITION, filed September 6, 1898, for the assessment of damages from the limitation of the height of buildings on and near Copley Square in Boston by St. 1898, c. 452.

At the trial in the Superior Court before *Sherman*, J., Edward H. Eldredge, a witness for the petitioner, who had been for thirteen years engaged in the real estate business in Boston, and was familiar with the value of land in Copley Square, testi-

fied that about January 1, 1900, the Hotel Cluny, an apartment hotel, adjoining the petitioner's premises, sold for $230,000. The petitioner then offered to show by this witness, that the passage of the act affected the price at which the Hotel Cluny was sold, to the detriment of the vendor. The judge excluded the evidence and the petitioner excepted. The witness further testified that the act damaged the property of the petitioner to the amount of $25,000, and that he came to this opinion by his knowledge of sales before that date and sales of adjoining property since.

At the close of the evidence, the judge refused to give three rulings requested by the petitioner, which are stated by the court, and instructed the jury, that, if the petitioner was damaged, the jury should give her compensation, but if she was not, they should give her nothing. Adding "in other words, if you find her property was worth just as much the next day after this restriction was put on as it was the day before, why then she is not damaged and your verdict is to be for the city."

The jury returned a verdict for the respondent; and the petitioner alleged exceptions.

H. N. Shepard, for the petitioner.

T. M. Babson, for the respondent.

BARKER, J. The exception to the refusal to allow the petitioner to show that in the opinion of a witness the price at which an adjoining parcel of real estate had been sold about January 1, 1900, was affected to the detriment of the vendor by the passage of St. 1898, c. 452, must be overruled. While the price at which the adjoining land had been sold was competent, an inquiry into the considerations determining the price would open a collateral investigation which the presiding judge properly might exclude from the consideration of the jury. *Old Colony Railroad* v. *F. P. Robinson Co.* 176 Mass. 387.

The other exceptions are to the refusal of three requests for instructions and to the charge so far as it was inconsistent with the requests. The requests were these: "First. That by Chapter 452 of the Acts of 1898 the property rights of the plaintiff were taken for the benefit of the public for which the plaintiff was entitled to some compensation. Second. That Chapter 452 of the Acts of 1898 put the burden of an easement upon the

property of the plaintiff for which she was entitled to recover compensation. Third. That the jury should find some damage for the plaintiff."

The charge allowed the jury to find damages for the petitioner by the operation of the statute. It was not the law that the petitioner was entitled at all events to recover a verdict for some damage or compensation for her property rights taken or the burden of the easement imposed on her property by the statute. Damages or loss in property sustained by any person by reason of the operation of the statute are to be recovered in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken on the laying out of a highway. St. 1898, c. 452, §§ 3, 4. This means that the damages to be awarded are the value of the property taken and of resulting damages if any to the remaining property not taken, less the amount of the special and peculiar benefit if any to the remaining property from the operation of the act. *Cross* v. *Plymouth*, 125 Mass. 557. *Abbott* v. *Cottage City*, 143 Mass. 521, 526. If the special benefit equals or exceeds the amount of damages ascertained by this rule the landowner is not entitled to a verdict for damages. Each of the requests was refused properly because inconsistent with this rule. The petitioner concedes in substance that special benefits could be offset and contends that no special benefits were shown. But there was evidence tending to show that the petitioner's estate did receive a special benefit by the limitation of the height of buildings by the act, in the taking away of the possibility that buildings upon her narrow lot in the interior of the block between two side streets entering Boylston Street, and having the right to light and air only from that street and the alley in the rear, should be deprived of light and air by other buildings exceeding the limit of height prescribed by the act. The amount of this special benefit was for the jury.

It is true that the charge did not state the rule for the assessment of damages with fulness. But the exception to the charge was only so far as it was inconsistent with the requests. If the petitioner desired explicit instructions as to the set-off of benefits she should have requested them, or at least called the attention of the presiding judge to that matter and to the contention now

made that under the charge, the jury could set off benefits which were general, occasioned merely by the beautifying of the square.

Exceptions overruled.

JOHN W. KEITH *vs.* ALFRED A. MARCUS & another.

Suffolk. March 11, 1902. — May 21, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Evidence. Attorney.

Declarations of a judge of the United States District Court are not admissible to show what occurred in that court twenty days before, and the fact that the party against whom the evidence is offered was present when the declarations were made, does not make them competent, if they were not made to him nor made under such circumstances that his silence could be treated as an admission.

It is not evidence of negligence on the part of an attorney at law, that he agreed to the insertion in the record of the United States District Court of a statement that his client had been released from arrest by an order of that court on a petition for habeas corpus, when no petition had in fact been filed, if it appears, that the parties at the time treated the case as formally within the jurisdiction of the judge holding the court, and treated his statement, that the arrested client should be released, as equivalent to a formal order, and the record was so made up, presumably with the approval of the court.

In an action by an attorney at law for fees and disbursements, the defendant alleged in recoupment that the plaintiff's services were worthless by reason of his negligence and wrong advice. The defendant introduced evidence, that the plaintiff brought for the defendant certain suits against an attorney of a creditor of the defendant for causing the defendant's arrest. *Held*, that the burden was on the defendant, to prove negligence on the part of the plaintiff in bringing the suits, and to show that there was nothing in the arrest of the defendant to create a liability in damages on the part of the person sued. *Held, also*, that in the absence of evidence that the suits were brought negligently and without good reason to believe that they could be maintained, evidence of money paid by the defendant to third persons on account of such suits rightly was excluded.

CONTRACT by an attorney at law for fees and disbursements. Writ in the Municipal Court of the City of Boston dated January 25, 1901.

On appeal to the Superior Court the case was referred to an auditor, who found for the plaintiff, and later was tried before *Hardy*, J., on the auditor's report and oral evidence. Mr.

Thomson, mentioned by the court, was the attorney for the creditor in whose suit the defendants had been arrested.

The jury returned a verdict for the plaintiff in the sum of $437.03; and the defendants alleged exceptions.

E. H. Savary, for the defendants.

J. G. Holt, for the plaintiff.

KNOWLTON, J. The first question to be considered is whether there was error in excluding testimony of a conversation between Judge Brown of the United States District Court and Mr. Thomson in reference to what occurred twenty days before, when the defendants were released from arrest. The occurrences of that earlier date could not be shown by subsequent declarations, even though the declarant was a judge of a court. The fact that the plaintiff was present when the alleged declarations were made does not render them competent, for they were not made to the plaintiff, and they do not appear to have been made under such circumstances that his silence can be treated as an admission.

The defendants excepted to the ruling that there was no evidence to go to the jury on the claim for recoupment set up in the answer. This claim was put on two grounds, first that the defendants were injured by the plaintiff's negligence in agreeing with the opposing counsel to a statement from which a record was to be entered, which subsequently was entered in the United States District Court. The statement was in these words, at the end of the record: "and thereafter ordered their release therefrom." The only witnesses who testified to the facts to which these words relate were the plaintiff and one of the defendants. The plaintiff's account of what occurred was as follows: The defendants being under arrest upon an execution for costs were, at his request, taken before Judge Brown from whom he asked for a writ of habeas corpus to obtain their release. The attorney for the creditor having come in, there was a hearing before the judge, and at the close of the arguments the judge, addressing the creditors' attorney said, "Mr. Thomson, are you willing that I should treat this matter as though there had been a formal petition filed for habeas corpus?" Mr. Thomson said "Yes," and Judge Brown said, "Very well. Then I am of the opinion that the men should be released." The

present plaintiff then said to the defendants, "You can go," and they left the court room.

The defendants' testimony was that they "saw Judge Brown, and just as has been stated before, he was of the opinion that if they were not released he should issue an order of release, and after conference between Mr. Thomson and Mr. Worrall [the arresting officer] they were told that they might go." The contention of the defendants is that the plaintiff was negligent in agreeing that the record might show that the judge ordered their release. But we are of opinion that the evidence would not warrant a finding of negligence on this account. The whole evidence indicates that the parties at the time, treated the case as formally within the jurisdiction of the judge, and treated his statement as equivalent to a formal order. The record was made up in that way, presumably with the approval of the court, and we are of opinion that the plaintiff cannot be deemed guilty of negligence in agreeing that the release was under an order of the court.

As to the defendants' contention that there was negligence in advising the bringing of suits against Thomson, there is nothing in the bill of exceptions to show the grounds on which the suits were brought, except that they were founded on the arrest. For all that appears there may have been good grounds for bringing them, and these defendants may yet recover large damages in them. From some of the language used at the trial in reference to them, we may conjecture that they were not well founded; but we cannot go beyond conjecture. The burden was on the defendants to prove negligence on the part of the plaintiff in bringing them. Arrests are often so made as to create a liability in damages. If there was nothing in the arrest of these defendants to create such a liability, the defendants have failed to prove the fact, and we cannot assume it. In the absence of evidence that the suits were negligently brought without good reason to believe that they could be maintained, the evidence of money paid by the defendants to third persons on account of them was rightly excluded.

Everything offered which bore upon the value of the services charged for by the plaintiff was submitted to the jury. We understand that the rulings of the court as to negligence relate

only to the matters set out in the amendment to the defendants' answer, namely, to negligence in consenting to the form of the record and negligence in bringing the suits.

Exceptions overruled.

MARY E. McGRATH & others *vs.* INHABITANTS OF WATERTOWN.

Middlesex. March 18, 1902. — May 21, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Way. Practice, Civil.

A petition for damages from the widening and alterations of a highway, under Pub. Sts. c. 49, §§ 68, 69, 79, St. 1892, c. 415, if land is taken, must be filed within one year from the day the way is entered upon and possession taken, and, in all other cases, within one year from the date of the order. Assuming that the defence that a petition was not filed in time under these provisions must be pleaded, and that it may be waived, yet, in a case where no answer has been filed and none demanded, the objection may be taken by an oral motion to dismiss made when the jury is impanelled, by consent reduced to writing during the trial and "formally filed in writing" some days after the verdict.

PETITION, filed July 26, 1899, under the statutes named by the court for a jury to assess damages from the widening and alterations of Waltham Street in Watertown.

No answer was filed.

At the trial in the Superior Court, on March 19, 1901, before *Hardy*, J., a jury was impanelled, and the respondent then for the first time made an oral motion to dismiss upon the ground that the petition was not filed within the time limited by the statute. On the suggestion of the judge and by agreement of the parties, consideration of this motion to dismiss was reserved until after verdict, time being given to the respondent to file its motion in writing. The evidence was submitted to the jury upon the issue of damages, and a verdict was returned for the petitioners in the sum of $465.10. The motion to dismiss was formally filed in writing on March 25, 1901, although the motion was given to the presiding judge at the close of the trial. At a subsequent hearing on the motion, at which the petitioners

objected to the right of the judge to act upon the motion as being presented and filed too late, the judge ordered that the petition be dismissed, and, by agreement of the parties, reported the case for determination by this court. If the order was correct, the petition was to stand dismissed, with costs to the respondent; otherwise, the verdict was to stand for the petitioners and judgment was to be entered thereon with interest from the date of the verdict.

R. R. Gilman, J. T. Wilson & P. Pinkney, for the petitioners.

J. E. Abbott, for the respondent.

HOLMES, C. J. This is a petition for a jury to assess the damages occasioned to the petitioners' land by the widening of a town way in Watertown. The petition is brought under Pub. Sts. c. 49, §§ 68, 69 and 79, the last as amended by St. 1892, c. 415, § 2. By the latter statute the petition must be brought within the time specified in Pub. Sts. c. 49, § 33, amended by § 1 of the same statute. If, as alleged in the petition, land of the petitioners' was taken, this would be within one year from the day when the way was entered upon and possession taken for the purpose of constructing the same, otherwise, within one year from the date of the order. The town voted in December, 1897, to lay out the way. The street was entered upon on May 26, 1898, and the work was finished on July 23, 1898. This petition was filed on July 26, 1899, and therefore was too late, and on this ground it was dismissed by the Superior Court. The case comes here on report. The petitioners contend that the defence was not open because not seasonably and properly set up, and also that the respondent's conduct precludes it from taking the defence.

The last mentioned contention seems to be an afterthought, and may be dismissed with a word. Such facts as are reported make it highly probable that the petitioners knew of every step as it was taken, and certainly are as far as possible from establishing as matter of law that the respondent was responsible for the petitioners' delay.

The facts with regard to the other matter are these. The case came on for trial on March 19, 1901. No answer had been filed and none appears to have been demanded. After the jury was impanelled the respondent made an oral motion to dismiss,

on the ground that the petition was filed too late. On the suggestion of the court, and by agreement, consideration of the motion was reserved until after the verdict, and time was given to the respondent to file the motion in writing. The motion was reduced to writing and given to the presiding judge before the close of the trial, but it was "formally filed in writing" some days after the verdict.

For the purposes of this decision it may be assumed that the petitioners' premise is true, and that in this case as in others the lapse of the year must be pleaded, and even that the defence may be waived, *Sawyer* v. *Boston*, 144 Mass. 470, 472, although if necessary those cases would have to be dealt with which declared that the earlier law went to the jurisdiction of the court and that the defect could not be cured by waiver. *Custy* v. *Lowell*, 117 Mass. 78. *Cambridge* v. *County Commissioners*, 117 Mass. 79, 83. The petitioners seek to distinguish these cases on the ground that the proceedings before a jury are no longer as formerly only appellate and that therefore now the limit of time is an ordinary statute of limitations — a ground which we do not adopt by passing it by.

We must take it from the action of the court and from the face of the statement that the respondent is entitled to stand as well as if the motion to dismiss had been filed in writing when it first was made, if the reduction to writing was of any importance. At that moment, as now, there was no answer and therefore every defence was open. The motion called the attention of the court and of the other side to this defence, and insisted upon it. More could not be required, on the strictest principles, so long as an answer was not demanded. See *Russell* v. *New Bedford*, 5 Gray, 31, 35. The rule that the ordinary statute of limitations must be pleaded does not mean that it stands worse than other defences and must be put in writing even when they are not. It presupposes that a written answer has been filed and has no application when the plaintiff is content to go to trial without one, as in cases of this kind often is done. As the case stood, the only question about which there could have been the least doubt is whether the petition should be dismissed or a verdict ordered for the respondent. That purely formal question was not intended to be brought here.

Petition dismissed.

MABEL T. DUNBAR *vs.* BOSTON AND PROVIDENCE RAILROAD CORPORATION.

Suffolk. March 19, 1902. — May 21, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Constitutional Law, Remedial statutes. *Boston Terminal Act.*

The constitutional provisions for the protection of property allow a certain limited degree of latitude in regard to the restoration of remedies that have been extinguished by lapse of time when the seeming infraction is not very great and when justice requires relief. On this principle, St. 1899, c. 386, extending until January 1, 1900, the time for filing petitions for damages from changes of grade made under the Boston terminal company act, St. 1896, c. 516, was held to be constitutional. The doctrine of *Campbell* v. *Holt*, 115 U. S. 620, was not passed upon.

PETITION, filed August 22, 1899, for damages to the petitioner's property on the easterly side of Dartmouth Street in the city of Boston from a change in the grade of that street made by the respondent under the provisions of St. 1896, c. 516.

At the hearing in the Superior Court before *Hopkins*, J., it appeared, that the work of raising the grade was begun by the respondent on September 20, 1898, and was completed on or about November 1, 1898; that there was no taking of any of the petitioner's land and the damages sought to be recovered were wholly caused by the raising of the grade of the street; that on March 14, 1898, the board of aldermen of the city of Boston, acting as county commissioners, made an order prescribing, among other things, that the extension of the respondent railroad should pass under Dartmouth Street and that Dartmouth Street should be raised; that on March 17, 1898, the respondent filed the location of the extension of its road, taking therefor in fee a strip of land on the southerly side of and adjacent to the main tracks of the Boston and Albany Railroad; and that on May 23, 1899, the Legislature passed St. 1899, c. 516, extending the time for filing such petitions until January 1, 1900.

The respondent asked the judge to rule, that the statute of 1899, extending the time for filing petitions, if it applied to this petition, was unconstitutional under the provisions of the Constitution of the Commonwealth and of the Constitution of the United States, because it removed the bar of the statute of limitations after the period of limitation had expired.

The judge refused so to rule, and submitted the case to the jury, under instructions as to damages which were satisfactory to the parties, and damages were assessed by them in the sum of $2,275.66. The respondent alleged exceptions.

J. H. Benton, Jr., for the respondent.

A. P. Worthen, for the petitioner.

HOLMES, C. J. This is a petition for the assessment of damages to land of the petitioner on Dartmouth Street in Boston caused by raising the grade of that street under the terminal company act. St. 1896, c. 516. The petition was filed under § 23 of the act, and therefore we may assume that the claim was subject to the limitation of one year imposed by that section, although no land of the petitioner was taken. The section contains a general provision giving a jury to parties who have suffered damage to be compensated under the act, and the limitation no doubt was intended to be coextensive with the grant. Upon this construction it is admitted that the petition was not filed within the year, and indeed the opposite view was not much pressed on any ground. The answer relied upon is that on May 23, 1899, "the time within which any party suffering damages whose land is not taken may file his petition in the Superior Court for damages accruing from a change of grade occasioned by the location and construction of any railroad by any railroad company other than the terminal company" under the above § 23 was extended to January 1, 1900. St. 1899, c. 386. The respondent contends that this statute is unconstitutional and brings that question here by exceptions. It argues no other point.

The statute assailed is of general operation, and if valid applies as well to the petitioner, who had unquestioned notice of the change of grade by the actual completion of the work before the year expired, as to possible cases of persons who might have found their remedy gone before they knew that

anything affecting their rights had been done. In such a case, apart from the authorities, it is impossible not to feel the greatest difficulty in sustaining the act. The nature of the difficulty is indicated in *Danforth* v. *Groton Water Co.* 178 Mass. 472. However much you may disguise or palliate the change by saying that the statute deals only with the remedy, or that a party has no vested right to a merely technical defence, or by adopting any other cloudy phrase that keeps the light from the fact, such legislation does enact that the property of a person previously free from legal liability shall be given to another who before the statute had no legal claim. It is not merely as it was put by the counsel for the respondent, following the cases, that the defence is as valuable and as much entitled to protection as the claim, if that be true, but the effect of the statute by enabling the barred claim to be collected is to allow property of the respondent to be appropriated which before was free. *Woodward* v. *Central Vermont Railway*, 180 Mass. 599. It is true that the property is not identified until it is seized on execution, but when it is identified by seizure it is taken as truly as land would be if it were allowed to be recovered in a real action notwithstanding the lapse of twenty years.

In the present case there is not the excuse apparent that the statute cured an earlier injustice, as might be the case where a petitioner had had no actual notice of the loss of any rights until he was too late. It cannot be said in more general terms that a statute of limitations as such embodies an arbitrary or merely technical rule. Prescription and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defects of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organism gradually shapes itself to what surrounds it, and resents disturbance in the form which its life has assumed. In cases like the present, when the period of limitations is short, no doubt other but also important elements are predominant, — the desirableness for business reasons of getting a quasi public transaction finished, — but whatever the details, the principle involved is as worthy of respect as any known to the law.

Nevertheless in *Danforth* v. *Groton Water Co.* 178 Mass. 472, it was held that a statute was constitutional which removed the bar of an earlier statute under circumstances where, according to the language of the later act and the cases, the lapse of time had destroyed the jurisdiction of the court. *S. C.* 176 Mass. 118. *Riley* v. *Lowell*, 117 Mass. 76. *Cambridge* v. *County Commissioners*, 117 Mass. 79, 83. So, whatever may be said of the reasoning by which the decision was reached, it was held in *Campbell* v. *Holt*, 115 U. S. 620, that the fourteenth amendment does not prevent the removal of the bar from a personal debt. Without repeating what we have said so recently, it is enough to say that the constitutional provisions allow a certain limited degree of latitude in dealing with cases where remedies have been extinguished by lapse of time when the seeming infraction of right is not very great and when justice requires relief. It is unnecessary to go so far as *Campbell* v. *Holt*. But in a case of this kind, where the original time allowed after actual notice was very short and may have seemed to the Legislature inadequate, where the extension was granted within little more than two months of the time when it could have been granted without question and not improbably before the transaction as a whole had been finished, where the plaintiff's claim is held to be barred only by a somewhat doubtful inference, and where in short we cannot say that the Legislature with its larger view of the facts may not have been satisfied that substantial justice required its action, we are not prepared to pronounce the statute unconstitutional in the face of the most authoritative decisions. We regard this case as distinguishable from a wholesale attempt to relieve from the effect of open and adverse possession of land for twenty years, and even as distinguishable from the similar attempt with regard to debts upheld in *Campbell* v. *Holt*. As yet it is not necessary for us to choose between that decision and the weighty intimations to the contrary in this court and elsewhere.

It is suggested that this is class legislation because the terminal company is excepted from the act. The statute applies to all companies concerned except the one named, so that if any part of it were open to that criticism it would seem to be the portion which makes the exception, not that which

lays down the rule. *Holden* v. *James*, 11 Mass. 396. But we have no facts before us which show that the terminal company was not excepted on constitutional grounds.

Exceptions overruled.

ANNIE O. KINGMAN *vs.* LYNN AND BOSTON RAILROAD COMPANY.

Middlesex. March 19, 1902. — May 21, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, On street railway. *Evidence*. *Practice, Civil.*

In an action against a street railway company for an injury caused by the plaintiff tripping over an iron ring attached to a trap door in the slats forming the floor of a car, which was standing erect instead of lying in the depression made to hold it, the plaintiff and other passengers testified, that the ring was standing erect immediately after the accident and was then pushed down with an umbrella by a passenger, and that repeatedly thereafter, whenever the car started after a stop, the ring rose and remained upright until pushed down by some passenger or the conductor. *Held*, that the evidence was competent, as tending to show, that the defendant should be charged with knowledge of the dangerous condition of the car or with negligence on the part of the conductor in not ascertaining the danger, as there was no reason to infer that anything about the car was different at the time to which the testimony referred from what it had been when the car left the barn after its morning inspection. *Held, also*, that knowingly to use a car in that condition was negligence on the part of the defendant; and, if the device for raising the trap door was allowed to get into and remain in such a condition that the ring usually rose when the car started, it was negligence not to discover and remedy that condition.

Where a witness was instructed, that he could testify to a general rule or practice but not to one or two instances of a certain occurrence, and testified, that he had observed such a practice or rule, and later, on cross-examination, testified, that he could not tell whether the event in question happened once a month, once a week, or once a year, but he should say, that it happened only occasionally, it was *held*, that this inconsistency was not a sufficient reason for striking out the testimony, but that the jury should be left to deal with it in view of the inconsistency.

TORT for injuries caused by the plaintiff tripping over an obstruction on the floor of a car of the defendant. Writ dated February 9, 1900.

At the trial in the Superior Court before *Sheldon*, J., the jury

returned a verdict for the plaintiff in the sum of $1,150; and the defendant alleged exceptions.

The following is a statement of the case made by *Barker*, J.:

The plaintiff entered as a passenger one of the defendant's electric street cars. She went in through the front door and finding the car very full stood near the door with a number of parcels upon her arm. After the car started she walked toward the rear to take a seat. The floor surface was of wooden slats in which was an iron ring used to lift a trap. The ring when not raised for that purpose was so designed as to lie flat even with or a little below the surface of the floor in a depression toward the front door from the point at which the ring was attached. When up the ring could be put down only toward the front door. While the plaintiff was walking to her seat she tripped, fell and was injured. She testified that as she started she caught her toe in the ring and that it threw her down. Another witness testified that when the plaintiff started forward the ring stood up and that when the plaintiff stepped over it she went headlong and the bundles flew and the conductor came in and helped her up, and that after the plaintiff fell a lady with an umbrella poked the ring back. The plaintiff also testified that she did not see the ring until after she caught her toe, that when she sat down she looked to see what it was she tripped over, that she saw the ring and that a lady took an umbrella and pushed it down in place. Another passenger testified that she saw the plaintiff enter the car and stand by the door, and that just as the car started a lady beckoned to the plaintiff to go to a seat, and the plaintiff went in that direction and caught her foot in the ring and fell, and that after the accident the ring was pushed down by a lady who had an umbrella.

Each of these three witnesses testified under exception that they did not notice the ring before the time of the accident and that they did notice it during the time they were in the car after the accident. The first witness testified under exception that the ring would fly up almost every time the car started after stopping. The plaintiff testified under exception that the ring would come up when the car started, that the lady pushed it down three or four times and that the conductor came in then and kicked it down, and also, upon cross-examination, that after

the accident she saw the ring coming up a number of times, and that the woman put it down with her umbrella, that the passengers were all talking about it, and that when the car would start the ring would go up. Her testimony that after she sat down she looked to see what she tripped over and saw the ring was also under exception. The testimony excepted to from the third witness was to the effect that the conductor pushed the ring down with his foot at another time after the accident and that the ring rose every time the car started after a stop. This witness also testified upon cross-examination that she noticed the ring come up frequently after the accident and that it was pushed down by a lady after the plaintiff fell and that the witness saw the conductor come in and push it down and saw it pushed down more than once by a lady with an umbrella.

The defendant introduced the testimony of a civil engineer who described the car and testified to a plan of the flooring. It then called its electrician, its assistant electrician, its employee who had charge of the repairs of cars, its master mechanic, a superintendent and another electrician, all of whom were familiar with the car except one and he had been present at certain experiments made with the car to ascertain whether the ring could be made to rise by starting the car. The evidence of these witnesses tended to show that the car originally had been purchased of a reputable maker, and had been changed by the defendant from a horse car to an electric car; that the traps were put in to give access to the electrical apparatus; that the ring was a device in common use and as safe as any known, and that the car had been inspected daily, and had been found all right in the morning both on the day of the accident and the day before, that none of these witnesses had ever heard or known of a ring coming up because of any motion of the car and that the rings remained in place when the car had been stopped and started in the course of experiments tried with a view to ascertain whether the rings could be made to rise by starting the car, that there was no known appliance so good for the purpose as the ring, and that the witnesses knew of no connection which could possibly be made between the electric motor and the ring to cause the ring to rise in the operation of the car.

The defendant then called the person who was the conductor

of the car on the day of the accident, November 28, 1899. He testified that he thought the plaintiff fell from stepping on her dress; that she had not reached the place where the rings were when she fell; that he did not go and push down the rings, did not see any woman with an umbrella pushing them down, and never after the accident saw any rings rise in the operation of the car. Upon cross-examination he testified that he never saw one of the rings rise when the car started, never knew of any other person hitting his toe against the ring in his car and falling, and did not remember a woman with a little girl riding in his car previous to the time of this accident who caught her toe in the ring of this car and was thrown; that he had operated this car and other cars of the same pattern for some time before, and had never known of any passenger being thrown down by a ring coming up in the car. The defendant also called the motorman, who testified that he opened the front door for the plaintiff, that she stood up and held the car handle after he had started the car, and he saw no more of her after that, and that he started the car easily and there was no unusual jerking of the car.

In rebuttal the plaintiff called a witness whose testimony was objected to as incompetent at that stage of the case and was admitted in the discretion of the presiding judge. The bill of exceptions did not state that an exception was taken to the admission of this testimony. The testimony was to the effect that in the fall of 1898 the witness was riding on this car in charge of the same conductor and with her little girl; that they entered the car at the front door, her daughter preceding her, and that when she had just left the door the daughter caught her foot in the ring and fell.

The plaintiff then called one Welch, formerly a conductor of the defendant upon this car, but no longer in the defendant's service. Under a ruling that the witness could not testify as to whether he saw the ring rise once or twice, but might as to whether there was a general practice or rule as to cars of that pattern, the witness said he could speak as to cars of that kind, and then followed this question and answer: *Q.* "At what time — when would they rise, at what point in the movement of the cars?" *A.* "Either starting or stopping I have observed it."

Upon cross-examination the witness said that he could not tell whether the rings rose once a month, once a week or once a year, and that he should say they rose only occasionally.

At the close of the testimony of this witness the defendant asked that all his testimony be stricken out. The judge said there was an inconsistency, but that it should be left to the jury, and the defendant excepted to the ruling.

At the close of all the evidence the defendant asked the judge to rule that there was no evidence in the case to warrant the jury in finding that the defendant or its servants or agents were negligent, and excepted to a refusal so to rule.

H. F. Hurlburt & S. B. Darling, for the defendant.

F. S. Hesseltine, for the plaintiff.

BARKER, J. After a verdict for the plaintiff the case is here upon the defendant's exceptions.

1. The first three exceptions are to the admission of the testimony of the plaintiff and two other passengers, present at the accident, that the ring in which the plaintiff testified that she caught her foot was standing erect immediately after the accident and was then pushed down by another passenger with an umbrella, and that repeatedly thereafter the same ring whenever the car started after a stop rose and remained upright until pushed down by some passenger or by the conductor.

The evidence was competent. There was no reason to infer that anything about the car was different at the time to which the testimony referred from what it had been when the car left the barn after its morning inspection. If during the time testified to the ring rose frequently as the car started and remained up until pushed down this tended to show that it had been doing the like since its use on that day began.

Knowingly to use a car in that condition was negligence on the part of the carrier, and the evidence was competent to show that the car had been in fact in that condition for so long a time before the plaintiff became a passenger that the defendant should be charged with knowledge of the dangerous condition, or with negligence on the part of the conductor in not ascertaining the danger.

2. The fourth exception is to the refusal to strike out all the

testimony of the ex-conductor called in rebuttal. It is not contended that his evidence upon direct examination was incompetent, but that his whole testimony shows that he was speaking of occasional occurrences only and not of a general or ruling practice. The court was right in ruling that the testimony was inconsistent with itself, and in leaving the jury to deal with it in view of the inconsistency.

3. As above stated, in the testimony of the first three witnesses as to the action of the ring at the time of and immediately after the accident there was evidence which would warrant the jury in finding that the defendant and its servants were negligent. However reputable the builder from whom the car had been bought, and however usual the particular device of the ring, if the device was allowed to get into and remain in a condition which usually raised it when the car started, it was negligence not to discover and remedy that condition.

Exceptions overruled.

WALLACE A. PARKER *vs.* REPUBLICAN COMPANY.

Suffolk. March 24, 1902. — May 21, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Libel. Damages. Evidence.

In an action for libel, the question, whether an account in a newspaper of a complaint and warrant and the trial thereon in a police court is a fair report of a judicial proceeding, assuming that these are judicial proceedings within the meaning of the law of privileged communications, is for the jury, as it depends in part upon oral testimony.

In an action for libel the plaintiff waived all damages from the date of the trial of another action which he brought against another defendant for the publication of substantially the same libel. The defendant offered in evidence a certified copy of the writ and declaration in the other action. The evidence was excluded. *Held*, that the exclusion was right. The declaration while on file in the clerk's office was not open to public inspection, and its mere filing should not be allowed to mitigate the damages recoverable in an independent suit.

In an action by a physician for a libel repeating a charge that the plaintiff had committed an assault on a female patient after rendering her partially insensible by a drug, evidence is admissible, tending to show the amount of the plaintiff's pro-

fessional income before and after the publication of the alleged libel, and the conduct toward him of his patients and acquaintances before and after such publication, and also his own feelings.

TORT FOR LIBEL, being one of five actions by the same plaintiff against different newspapers which were tried together by an order of a judge of the Superior Court under St. 1897, c. 525, § 3. Writ dated January 5, 1898.

At the trial in the Superior Court before *Richardson*, J., the plaintiff relied only on publications of January 7 and 9, 1896. It appeared that at the time of the publications the plaintiff was a physician living at West Springfield and practising in Holyoke.

The publication of January 7, 1896, was as follows: "Threatened Doctor's Life. A Broker Arrested on Complaint of Dr. Parker. Amenzo Griffith, a broker, who lives at 115 Florence Street, was arrested yesterday afternoon by the police on a warrant sworn out in Holyoke by Dr. Wallace Parker, of West Springfield. Dr. Parker, who has an office in Holyoke, charges Mr. Griffith with threatening to do him bodily harm and the case, so far as the details of it have reached the police, is a peculiar one. Some time ago Dr. Parker operated upon Mrs. Griffith, she having had some trouble with her nose. Mr. Griffith asserts that while his wife was yet under the influence of chloroform she told him that Dr. Parker after he had reduced her to a state of partial insensibility by the use of the drug, committed an assault upon her. This statement of his wife so incensed Mr. Griffith, that last week he wrote the doctor a letter saying that if he found out the statements of his wife were true, he would kill him on sight. It appears that Dr. Parker was alarmed by this statement and considered his life in danger, so he appealed to Captain Beecklin yesterday and wanted to have Mr. Griffith placed under arrest on the ground that he was unbalanced mentally. The captain told him that he could not take this step without a judgment from the Probate Court, and Dr. Parker decided to swear out the warrant for the arrest of Mr. Griffith on the charge mentioned. Mr. Griffith at once furnished bail, and the case will be brought up in the Police Court this morning."

The publication of January 9, 1896, was as follows: "Griffith

Must Keep the Peace. The trial of Amenzo Griffith of this city was held before Judge Pearsons yesterday morning, and he was put under bonds to keep the peace for six months. The trial was on the complaint of Dr. Parker of West Springfield, that Griffith had in various manners threatened to kill him, and Parker feared that he would carry out his threats. The trial was a short one, and the defendant did not take the stand. He did not deny or confess that he had used threatening language toward Parker. Dr. Rhodes of this city testified that Griffith had said in his hearing that he would kill Parker on sight. He made this statement in Parker's office Saturday morning. Mrs. Cox, of Holyoke, said that a man whom she could not identify, had told her in Dr. Parker's office that he would kill Parker, and had in addition told her the reason why. Another witness testified that the man who had talked to Mrs. Cox was Griffith. A letter which Parker had received was introduced, and Mr. Jordan of this city testified that it was in the handwriting of Griffith. It was not read in full in Court, but it stated that Mrs. Griffith had made certain charges against Parker while in a delirious state, and that if she repeated them when she recovered her health, Griffith would certainly shoot Parker. Judge Pearsons said in deciding the case that a man who would make such threats on the strength of an insane person's statements, was not fit to be at large, and he did not consider that Griffith had any warrant for them. He therefore ordered him to furnish bonds to keep the peace for six months."

The defendant's evidence tended to prove the truth of the matter set forth in the publications, including the truth of the charge that the plaintiff had assaulted the wife of Amenzo Griffith while he was operating upon her and while she was under the influence of a drug. The plaintiff's evidence tended to contradict all this evidence of the defendant.

The defendant introduced evidence, tending to show that the publication of January 7, 1896, was authorized and assented to by the plaintiff, and that both of the publications were fair reports of judicial proceedings.

The defendant offered in evidence a certified copy of the writ and declaration in the case of *Wallace A. Parker* v. *Amenzo Griffith*, in the Superior Court for the County of Hampden.

The plaintiff waived all damages after March 19, 1897, the date of the first trial of the case of *Wallace A. Parker* v. *Amenzo Griffith*. Thereupon the judge excluded the copy, and the defendant excepted. A copy of the whole record in that case was also offered and excluded.

At the close of the evidence, the defendant requested the judge to give the following instructions, as well as others which were waived:

1. Upon the pleadings and evidence the plaintiff is not entitled to recover.

2. The alleged libel published in the Springfield Republican of January 9, 1896, was a fair report of judicial proceedings and fair comment thereon, and the plaintiff cannot recover.

7. The alleged libellous publication in the Springfield Republican of January 9, 1896, is a fair report of judicial proceedings and fair comment thereon, and the plaintiff cannot recover.

9. The plaintiff is not entitled to recover by reason of the publication in the Springfield Republican of the alleged libellous article of January 9, 1896.

The judge refused to give these instructions, leaving the questions of whether the articles contained a fair report of judicial proceedings and fair comment thereon to the jury.

The jury returned a verdict for the plaintiff in the sum of $1,645; and the defendant alleged exceptions.

J. E. Cotter, J. B. Carroll & W. H. McClintock, for the defendant, submitted a brief.

W. R. Bigelow, for the plaintiff.

BARKER, J. 1. The publications of January 7 and 9 were admitted at the trial to have been made by the defendant, and it is not contended that the language was not defamatory. The defences of the truth of the charges and that the plaintiff authorized and consented to the publication of January 7, raised questions of fact upon which the evidence was conflicting, and which were for the jury. The remaining defence of privilege, that the publications were fair reports of judicial proceedings, was also for the jury. If we should assume that the complaint and warrant of January 6 was a judicial proceeding within the meaning of the law of privileged communications whether the publication of January 7 relating to that complaint and the publication of

January 9 relating to the trial upon it, were fair reports of judicial proceedings, depended in each instance in part upon oral testimony the truth of which was a question for the jury, and it was for them to say whether the defence was established. *Wright* v. *Lothrop*, 149 Mass. 385, 390. *Howland* v. *Blake Manuf. Co.* 156 Mass. 543, 572. These considerations show that the exceptions to the refusal to give the first, second, seventh and ninth requests, and to the action of the judge in leaving to the jury the questions whether the articles contained a fair report of judicial proceedings and fair comment thereon were not well taken. The action of the judge was at least sufficiently favorable to the defendant. The exceptions to the refusal to give the fifth and sixth requests are waived by the defendant's brief.

2. The defendant argues its exception to the exclusion of the writ and declaration in the case of *Parker* v. *Griffith*, and does not argue its exception to the exclusion of the record of that action. The writ was sued out on January 7 and the declaration filed on February 3, and the first trial was on March 19, 1897. The plaintiff in the trial of the case at bar waived all damages from that date. It was not until that date that the declaration in *Parker* v. *Griffith* could have been given to the public and then only as a part of a fair report of the trial, nor was the declaration itself open to public inspection. *Cowley* v. *Pulsifer*, 137 Mass. 392, 396. To hold that the victim of a libel by merely filing a declaration in legal proceedings for redress mitigates the damages recoverable by himself from a third person who has independently published substantially the same libel would be a perversion of justice.

3. We see no error in the admission of the testimony of the plaintiff tending to show the amount of his professional income before and after the publication of the alleged libels, the conduct and treatment of his patients and acquaintances or his own feelings. The declaration alleged that he was a physician, and that he had been caused annoyance, and had been disgraced and subjected to loss of reputation and of business and greatly damaged in his profession as a physician and had suffered in his credit and good name. The evidence excepted to tended to prove these allegations, and the form of the questions was care-

fully guarded by the presiding judge, and all the elements of damage were "natural consequences of a manifestly injurious act." *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, 245.

Exceptions overruled.

FRANKLIN S. DOBBINS *vs.* JOHN A. LANG & others.

Suffolk. April 2, 1902. — May 21, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Contributory, Employers' liability, assumption of risk.

The plaintiff, a boy in a machine shop, in operating a steam power machine for cutting out metals which was controlled by a treadle, found that a box which had been placed beneath the machine was in the way of his foot as he withdrew it from the treadle. He tried to find his employer, to ask him to have the box removed as he feared his foot might catch on it. He failed to find him, and returning to the machine resumed his work. His foot caught against the box, so that he was unable to remove the pressure from the treadle, and the die came down on his hand and cut off two fingers. *Held*, that he could not recover from his employer for this injury, as he was not in the exercise of due care, and also assumed the risk of the danger he had foreseen.

TORT by a boy in a machine shop against his employers for the loss of two fingers cut off by a steam power punch press which the plaintiff was engaged in operating. Writ in the Municipal Court of the City of Boston dated October 12, 1900.

On appeal to the Superior Court the case was tried before *Bond*, J. It appeared that the machine was used for stamping and cutting metals into various forms, and its operation was controlled by a lever moved by the foot of the operator pressing upon a treadle. Dies of various kinds could be used in the press. Some of the dies used had an opening in them which permitted the finished product to drop into a box placed beneath the press, while other of the dies used required the operator to place the work on the die with his fingers, and after the operation to remove the stock from the die.

The plaintiff was seventeen years old and on May 1, 1900, entered the defendants' employ as an apprentice to learn the trade of a machinist. The accident occurred on September 15

of the same year. The plaintiff in his testimony described the accident as follows:

"On the day of the accident I was working on a bench in one side of the shop. John Lang came to me and said that he had a job on a large upright press for me to do; he showed me a small piece of brass, a stamp, and he told me just as soon as I got through the job I was working on to go over there and do that job; I had worked on that press once before for part of a day, but not on the work I did on the day of the accident, but when I worked on the press before I did not have to put my hands under the dies; I don't know exactly how long before; the press was a very large upright press and it was operated by steam and a lever; there was a foot lever and you pressed the foot lever with your foot and the die drops down upon the other part of the die which is stationary, and by that means all sorts of novelty work and brass and steel are cut and died or stamped. The press is supported by four legs; there is simply a lever underneath; the bottom of the press is high enough from the floor so that you can sit down in a chair and have your knees free from the upper part. The lever is attached to the upper part of the press by a wire; when you press upon the lever it causes a revolution; the upper portion of the die or punch, or whatever it may be, is forced down. The stock I was obliged to put in with my hands upon this job; I had only done one job before that, and I put the stock in the press with my hands on the job done on the day of the accident, but my hands were not exposed to the die at all on the other job. The stock to be operated on by the press in the job done previous to the day of the accident was put under the die by a wire. . . . On the day of the accident Mr. Lang set me to work on this press; he said that he had set up the die and that she was all right and ready for me to go to work as soon as I got through with the job I was working on.

"When I had used this press before there was a small box to catch the work as it came through under it. I do not know how large it was, but there was a different box under the machine at the time I was injured; the box that was under the machine the day I was injured was a larger one; it was from one quarter to one third larger; but I could not give the figures to show how much more space it occupied under the machine than the other

box occupied, but there was a space of fully a foot between the edge of the first mentioned box and the lever; there was only about a couple of inches for my foot to work in outside the lever on the box under the machine on the day of the accident; the first box was about a foot from my foot, and the second box was about two inches from my foot, and the second box was there at the time I was injured. . . . And I was working there I don't know exactly the time before I was hurt, but I noticed this box of tin was there and that it was interfering, and I got up and looked round for Mr. Lang, Sr., to ask him if he would have the box taken from there; I could not find him; he was not in the shop and I don't know where he was. I did not ask; I could not find him. So I went to work again and my foot caught somewhere between this box of tin and the lever when I went to take my foot off, so that instead of my foot going to its natural position and the die going up and stopping, it caused the die to revolve the second time upon my left hand as I was taking my work out. The die came down on my left hand; my foot caught in the side or edge of the box; I tried to pull it away; my foot was held there, so the die was half way down before I realized that my foot was held there, so I could not take it off, and just as soon as I found out that my foot was caught, my hand was under the die like that, and it was about that far from my hand before I realized that my hand was caught. . . . My foot got caught as I was taking it off, because that box of tin was too near and it interfered with the pulling of my foot back and it caught; there was no other reason that I know of."

On the cross-examination of the plaintiff, there were the following questions and answers on the subject of the box:

"*Q.* Who put the box in there that was there at the time that you were injured? *A.* The foreman of the shop and myself. — *Q.* That is, you went with the foreman and got the box? *A.* I did. — *Q.* And you knew what the box was used for? *A.* I knew it was a box full of all kinds of tin. — *Q.* Was there any cover to it? *A.* There was no cover, but it had sides. — *Q.* You took it with the superintendent and carried it to this machine, and placed it under the machine? *A.* I did. — *Q.* You carried it and placed it under the press that you were working on before you were injured? *A.* Yes, sir. — *Q.* And you knew the box

was there when you operated the machine that afternoon? *A.* I did. — *Q.* You said that just before you went to see Mr. Lang, Sr., and could n't find him, it interfered with you. What do you mean by that? *A.* I mean my foot would kind of strike the box as I pulled it over. — *Q.* So that afternoon when you had started to operate it you had discovered that the box was interfering with the use of the lever? *A.* I had. — *Q.* Why did you go to see Mr. Lang? *A.* Because it was put there by Mr. Lang's orders. — *Q.* Did you go to him because you wanted it removed, because you thought there was danger of your foot catching? *A.* Because I wanted it moved. — *Q.* Because you thought your foot might catch in it? *A.* I did."

At the conclusion of the evidence, the defendants requested the judge to rule that the plaintiff was not entitled to recover, and to order a verdict for the defendants. The judge refused both requests.

The jury returned a verdict for the plaintiff in the sum of $500; and the defendants alleged exceptions.

G. C. Dickson, C. S. Knowles & W. B. Sprout, for the defendants.

F. M. Davis, for the plaintiff.

BARKER, J. The danger of such an accident as that by which the plaintiff was hurt was not only obvious, but was so clearly and fully known to him and so clearly appreciated by him that solely because of it he stopped work and left his machine and went to find one of the defendants in order to have the cause of danger removed. Not finding the person whom he sought he went back to the machine and resumed work perfectly aware of the danger. This was not due care and was an assumption of the risk. He was old enough and intelligent enough to have known better and as he acted under neither ignorance nor constraint he has no cause of action and the jury should have been so told.

Exceptions sustained.

ELMER H. PERKINS *vs.* CHARLES E. PERKINS.

Suffolk. December 3, 1901. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Trust, Resulting. *Frauds*, *Statute of*.

A bill in equity to compel the defendant to convey certain land to the plaintiff alleged, that the plaintiff and defendant were brothers and that in pursuance of a plan of their mother to divide her property between them she gave certain other land to the defendant and intended to give this land to the plaintiff, that this land was paid for with money raised by a mortgage on other land then standing in the name of the defendant, that the land in question was conveyed to the defendant, the deed being placed in the possession of the plaintiff, and that the defendant accepted the conveyance with the oral agreement made with his mother and the plaintiff, that whenever requested to do so by his mother he should convey the land to the plaintiff, and that in the meantime he should permit the plaintiff to occupy the land free of rent on paying taxes and for repairs on the house and buildings, that under this agreement the plaintiff entered and occupied the premises openly and exclusively and made expenditures and improvements upon the estate with the knowledge of the defendant, that the mother requested the defendant to convey the land to the plaintiff which he refused to do, and, the mother having died, the plaintiff demanded a conveyance of the land from the defendant. On demurrer *held*, that the bill could not be sustained; that the facts alleged did not establish a resulting trust, nor any trust, in favor of the plaintiff, and that there was no such performance on the plaintiff's part as to take the case out of the statute of frauds. *Semble*, that on the facts alleged there might have been no trust in favor of the mother and no consideration for the alleged agreement of the defendant.

BILL IN EQUITY, filed June 3, 1901, to compel the defendant to convey certain real estate in Scituate to the plaintiff.

The case came up on demurrer in the manner described by the court. The amended bill was as follows:

"Respectfully represents Elmer H. Perkins of Scituate, in the County of Plymouth in said Commonwealth, that on the twentieth (20th) day of November, A. D. 1896, his mother, Mary E. Perkins, wife of Isaac Perkins, both formerly of Chelsea in said County of Suffolk, now deceased, actuated by love and affection for him, the said Elmer H. Perkins, purchased of Benjamin F. Dutton of Malden, in the County of Middlesex in said Commonwealth, and Harry F. Dutton of Medford, in said County of Middlesex, a certain piece of real estate located in said Scituate,

a full description of which is contained in the deed, a copy whereof is hereto annexed and marked 'Exhibit A,' for the purpose of giving said real estate to him, the said Elmer H. Perkins. That for the purpose of paying for said real estate located in said Scituate the said Mary E. Perkins received the sum of nine hundred and fifty dollars ($950), which said sum was raised by mortgage upon certain property in Chelsea then standing in the name of one Charles E. Perkins, a son of the said Isaac and Mary E. Perkins, and a brother of your said petitioner; a full description of which said property is contained in the mortgage, a copy whereof is hereto annexed and marked 'Exhibit B.' That said Mary E. Perkins conducted all of the negotiations prior to the raising of said nine hundred and fifty dollars ($950), and the placing of said mortgage. That the grantee named in said deed conveying said property in Scituate, so paid for by said Mary E. Perkins, was the aforesaid Charles E. Perkins; that the purpose of said Mary E. Perkins in having the name of Charles E. Perkins inserted in said deed as the grantee was that your said petitioner, Elmer H. Perkins, might wait a certain length of time before receiving said property. That said deed was given by said Mary E. Perkins to your said petitioner, Elmer H. Perkins, at the time of said conveyance, and has ever since remained in the possession of your said petitioner, Elmer H. Perkins. That the said Mary E. Perkins caused said mortgage to be placed upon said property in Chelsea and bought said property in Scituate in pursuance to a plan which she had formed for dividing all of her property among her children at the time of her death. That the value of said property situated in said Chelsea over and above said mortgage, was, in her opinion, equal to the value of said real estate situated in said Scituate. That she intended to give said property situated in said Chelsea to said Charles E. Perkins as his portion of her said estate, and that she intended to give said property situated in said Scituate to your said petitioner, Elmer H. Perkins, as his portion of her said estate.

"That in pursuance to her plan to divide said estate the said Mary E. Perkins had, on a day precedent to said mortgage, to wit, the twelfth (12th) day of January, A. D. 1892, conveyed said property situated in said Chelsea to said Charles E. Perkins,

as will appear by a deed, a copy whereof is hereto annexed and marked 'Exhibit C'; and that in further pursuance to her said plan to divide her said estate, the said Mary E. Perkins, at some time subsequent to said conveyance, viz., on the day of , requested said Charles E. Perkins to convey said property located in said Scituate to your said petitioner, Elmer H. Perkins, in accordance with her design at the time when she negotiated the purchase of said property; that said Charles E. Perkins then and there refused to convey said property to your said petitioner, Elmer H. Perkins, and has ever since refused to make said conveyance though often requested so to do both by the said Mary E. Perkins, prior to her death, and by your said petitioner, Elmer H. Perkins.

"That the said Mary E. Perkins died on the first (1st) day of January, A. D. 1900; that the said Charles E. Perkins accepted said conveyance of said property on the terms and conditions above set forth, and fully understood the intentions and plans of the said Mary E. Perkins.

"That the said Charles E. Perkins accepted said conveyance of said property on the terms and conditions above set forth, and did, at the time when said Mary E. Perkins conveyed said property situated in said Chelsea to said Charles E. Perkins, enter into an oral agreement with said Mary E. Perkins and said Elmer H. Perkins to convey to said Elmer H. Perkins by good and sufficient deed said parcel of land located in said Scituate whenever and at such time as the said Mary E. Perkins should direct said parcel of land located in said Scituate to be conveyed to said Elmer H. Perkins; and at the said time the said Charles E. Perkins further agreed with the said Mary E. Perkins and the said Elmer H. Perkins, that until such time as said property should be conveyed by the said Charles E. Perkins to the said Elmer H. Perkins, to permit said Elmer H. Perkins to occupy said parcel of land located in said Scituate free of rent, on the condition that the said Elmer H. Perkins should pay any and all taxes due upon said parcel of land located in said Scituate, and should also pay for any and all repairs necessary to be made upon the house and buildings situated upon said parcel of land located in said Scituate.

"And the said Elmer H. Perkins, in pursuance of said agree-

ment, was permitted by the said Charles E. Perkins to enter into possession of the premises conveyed to the said Charles E. Perkins as above described, and the said Elmer H. Perkins has continued in possession of said premises to the date of the filing of this complaint; his possession has been open, visible, notorious and exclusive, peaceful and undisputed by the said Charles E. Perkins, and has been accompanied by expenditures and profitable improvements upon the estate made with the knowledge of the said Charles E. Perkins.

"Wherefore your petitioner prays that an injunction issue from this honorable Court restraining the said Charles E. Perkins from conveying said above described property situated in said Scituate, or from placing any mortgage upon said property. That the said Charles E. Perkins be ordered to execute a deed conveying said property situated in said Scituate to said Elmer H. Perkins, and that the said Charles E. Perkins be ordered to cancel and discharge any mortgage or other incumbrance heretofore placed upon said property by him, the said Charles E. Perkins. And for such other and further relief as to this honorable Court shall seem meet."

Exhibit A was dated November 20, 1896, and acknowledged November 30, 1896. Exhibit B was dated and acknowledged November 25, 1896. Exhibit C was dated and acknowledged January 12, 1892. By the last named deed Mary E. Perkins conveyed to the defendant the lot mortgaged for $950 by Exhibit B and also another lot in Chelsea.

J. G. Robinson, for the plaintiff.

C. E. Hayward, for the defendant.

MORTON, J. This is a bill in equity to compel the defendant to convey to the plaintiff certain land in Scituate, and to cancel and discharge any mortgage placed thereon by him. There was a demurrer to the bill as originally filed which was sustained and the bill was thereupon amended. There was also a demurrer to the amended bill, and this too was sustained, and the bill was dismissed. The plaintiff appealed. It is this demurrer which is before us and the ground of it is the statute of frauds, that what is relied on is an oral contract for the conveyance of land.

The plaintiff contends that there was a resulting trust in his

favor and that therefore the statute of frauds does not apply. But we see no ground on which such a contention can be sustained. No part of the consideration for the conveyance moved from or was furnished by the plaintiff. The most that can be said is that the defendant orally agreed with the plaintiff and his mother at the time of the conveyance that as part of the plan which the latter had formed for dividing her property amongst her children, of whom the defendant was one, at her death, he would take a deed of the premises and did so with the understanding that he would convey the property to the plaintiff when his mother requested, and that in the meantime the plaintiff should be permitted to occupy on payment of the taxes and repairs, and that the plaintiff entered and took possession and had occupied openly and exclusively and had made expenditures and improvements, but that the defendant had refused to convey the property to the plaintiff when requested by his mother. It is manifest that this falls far short of establishing a resulting trust or any trust in the plaintiff's favor. Indeed it is doubtful whether upon the allegations of the bill there was a trust in the mother's favor or any consideration for the alleged agreement on the part of the defendant. The money, with which the premises in question were paid for, was the proceeds of a mortgage placed by the defendant on property which the mother had conveyed to him several years before as a part of the same plan of division already referred to, and in which, therefore, it would seem she had and could have no interest, by way of resulting trust or otherwise, that furnished or constituted the consideration for the conveyance to the defendant and there is no allegation that the money thus obtained was lent to the mother and used by her in paying for the land in question. *Fitzgerald* v. *Fitzgerald*, 168 Mass. 488. *Campbell* v. *Brown*, 129 Mass. 23. *Whitten* v. *Whitten*, 3 Cush. 191. But if we assume that there was a good and sufficient consideration, and that the agreement was sufficiently definite, we are of opinion that there has been no such part performance as to take it out of the statute and to entitle the plaintiff to a conveyance. The only allegation is that the plaintiff entered and took possession under the agreement and has had possession openly and exclusively and has made expenditures and profitable improve-

ments with the knowledge of the defendant, and has also it may be inferred paid the taxes. This is plainly not sufficient. *Burns* v. *Daggett*, 141 Mass. 368. Indeed the plaintiff does not contend that it was and we only mention it to show that it has not been overlooked.

Decree affirmed.

AUGUSTUS HEMENWAY & others, trustees, *vs.* AUGUSTUS HEMENWAY & others.

Suffolk. December 4, 1901. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

Capital and Income.

The stockholders of a coal company, the par value of whose shares was $50, accepted an offer of $276 a share for all their stock with an arrangement that the purchase should not include a surplus called "treasury assets," which was to be liquidated and distributed to the stockholders of record on a certain day as an extraordinary dividend. These assets besides cash, coal and accounts receivable included $3,000,000 of railroad bonds used as working capital. The dividend was declared by the directors as "representing accumulated and undivided profits of the company." The total amount of the dividend was between two and three times as much as the par value of all the capital stock. On a bill for instructions by a trustee under a will, to determine whether the dividend should be treated as capital or income or as in part capital and in part income, it was *held*, that the directors treated the assets as income and properly could do so, and that the dividend was one wholly of income.

MORTON, J. This is a bill for instructions by trustees under the will of Augustus Hemenway. The case was reserved for the full court upon the pleadings and an agreed statement of facts, "such decree to be entered as law and justice may require." The question is whether a dividend declared by the directors of the Pennsylvania Coal Company shall be regarded in whole or in part as capital or income, and it arises under the seventh clause of the will which provides that the rest and residue of the property disposed of by the will shall be held in trust during the life or lives of the wife and children of the testator and for twenty years after the death of the longest liver, and that the income, subject to certain annuities, shall be payable semi-

annually to such of his wife and children as may be living at the times of payment, and upon the termination of the trust, either in the manner above provided, or upon the happening of other contingencies to which it is not necessary now to refer more particularly, the trust property shall be transferred and paid over to such of the testator's lawful issue as may then be living and upon default of such issue then to his heirs at law.

The Pennsylvania Coal Company is a corporation organized under the laws of Pennsylvania with a capital stock of $5,000,000 divided into shares of the par value of $50 each and is engaged in the business of mining and selling coal. At the time of his death in 1876 the testator owned six hundred and twenty-five shares which constituted a part of the rest and residue of the estate disposed of by his will. For many years dividends at the rate of sixteen per cent have been paid and occasionally there has been an extra dividend. A large surplus has been accumulated, and the total amount of the dividend in question was between two and three times as much as the capital stock. In December, 1900, J. P. Morgan and Company offered to buy all of the stock at $276 per share, the purchase not to include certain assets which constitute the dividend in question. It was stated in the offer that these assets were "treasury assets" and were to be liquidated and distributed to the stockholders of record of January 8, 1901, as an extraordinary dividend. In a circular addressed to the stockholders by the directors and certain stockholders, recommending the acceptance of the offer, the statement in the offer of Morgan and Company that these assets were "treasury assets" was repeated and it was further said that they were reserved for distribution as a dividend amongst the stockholders of record on the above date. Subsequently the directors voted that "a dividend be and the same is hereby declared on the capital stock of this company, consisting of the said assets, payable as hereinafter directed, to the stockholders of record at the close of business on January 8, 1901." The assets were described in a preliminary recital in the vote and were there spoken of as "representing accumulated and undivided profits of the company."

So far as the corporation and its directors were concerned,

it is evident, we think, that the dividend, though an extraordinary one, was regarded as a dividend of income or profits. The circumstances under which it was declared also tend, we think, to show that it was a dividend of income. The stock that was purchased was stock in a going concern. It can hardly be supposed that the purchasers would have consented to anything that would have resulted in an impairment of the capital, or, what would amount perhaps to the same thing, to the abstraction of funds that were needed in the business of the company. On the other hand the occasion was a timely one for the distribution of undivided profits or earnings amongst the stockholders. Undoubtedly the purchasers might have bought everything, if they and the stockholders could have agreed on a price for the stock, but they did not. And the reasonable conclusion is that the assets were regarded by them as well as by the corporation and directors as income and not as capital.

The remaindermen contend, however, that the real transaction was a transfer of the corporation to Morgan and Company by a sale of the stock, and that the distribution of the assets, though in form a dividend, was in reality a part of the consideration received for the stock and should therefore be regarded as principal and not income. And they insist also that the transaction was analogous to the winding up of a corporation, and that the case is governed by *Gifford* v. *Thompson*, 115 Mass. 478. They further contend that if this is not so, a part at least of the assets were capital and as between the life tenants and the remaindermen should be treated accordingly in the distribution.

There is no doubt that a court of equity will look in any given case at the substance of the transaction rather than its form. *Rand* v. *Hubbell*, 115 Mass. 461. *D'Ooge* v. *Leeds*, 176 Mass. 558. There can be no question that what was contemplated was, the transfer of the corporation from the control of one set of stockholders to the control of another set of stockholders, and that this was to be accomplished by a sale and transfer of the stock. It is very likely true also that the large dividend that was to be paid helped the sale of the stock, and the success of the scheme. But the stock was sold, so far as appears and as already observed, as stock in a going concern.

There was no winding up of the corporation or anything analogous to it. And the dividend was paid as a dividend of assets belonging to the corporation, and, though paid through Morgan and Company, constituted in no just sense a part of the consideration received by the stockholders for parting with their stock. The assets belonged to the coal company and could have been divided by the directors amongst its stockholders irrespective of the transaction with Morgan and Company and independently of it. There is nothing to show that stockholders could not have taken the dividend and retained their stock, and that the stock would not have continued to be worth what Morgan and Company were paying for it, and that consequently there could not have been and was not any ground for saying as was said in *Daland* v. *Williams*, 101 Mass. 571, 574, that the option was "of no value." Probably it was not expected that any stockholder would take that course, and it does not appear that any stockholder did. These petitioners did not, and very likely it would not have been prudent management for them or any other stockholder to have kept their stock under the circumstances. But the legal effect of the transaction as regarded the right of the stockholder to keep his stock and take the dividend was, it seems to us, as we have stated it. *Davis* v. *Jackson*, 152 Mass. 58. The transferring of the assets to trustees, for special reasons, to be converted into cash for the payment of the dividend, and the payment of a dividend of two hundred per cent through Morgan and Company concurrently with the payment for the stock by them, do not give to the transaction, it seems to us, the character for which the remaindermen contend, or make the dividend any the less a dividend of income. We have assumed that if the real transaction was as contended and if the dividend was made and paid as part of the consideration for the transfer of the stock, the contention that it was principal and not income would be sound. If the case stood differently it might deserve consideration whether that would be so, and whether a part of it at least should not be regarded as income. It is not necessary, however, to consider that question now.

There remains the question whether the assets that were distributed can or should be regarded in whole or in part as capital.

They consisted of cash and coal on hand, bills and accounts receivable less bills and accounts payable, all loans to others including a railroad bond and mortgage of $176,225 and all stocks and bonds of corporations and others, except $3,000,000 of the Erie and Wyoming Railroad Company bonds in the treasury available as working capital, and were carried on the books of the company principally under these accounts: — a profit and loss account, an insurance account, and a coal-land-renewable-fund account. The funds represented by these accounts were mingled together, and were used for investment and for loans at interest. Deducting the $3,000,000 of railroad bonds left in the treasury as working capital, there was not enough to make up the amount that was distributed, and the balance consisted of cash on hand and coal and the net amount of the bills and accounts receivable. There is nothing to show that the directors were not justified in regarding the cash on hand, the coal, and the net amount of bills and accounts receivable as profits or income in the strictest sense of those words. For aught that appears they were the proceeds of the capital employed in the current business remaining after the payment of all bills and accounts payable. It is conceded that the money included in the three accounts referred to was originally profits, but it is contended that it had become a part of the permanent capital. It is no doubt true that profits do not of necessity always remain such, and that they may be converted into permanent capital without any formal action or declaration on the part of the corporation or its directors. *Minot* v. *Paine*, 99 Mass. 101. But they do not become capital by mere accumulation and accretion except in special cases and under special charter provisions (*Sugden* v. *Alsbury*, [1890] 45 Ch. D. 237; *Sun Mutual Ins. Co.* v. *Mayor & Commonalty of New York*, 4 Seld. 241; *People* v. *Board of Supervisors of New York*, 16 N. Y. 424) nor by the mere lapse of time, though that may be the practical effect in cases where in consequence thereof it becomes difficult or impossible to distinguish them from capital. So long as their identity is preserved, we do not see why the directors may not regard them as profits and treat them accordingly. *Leland* v. *Hayden*, 102 Mass. 542. In order to become capital they should be applied, we think, in some effectual way to a permanent

increase of the property which is used in the business of the corporation. They may be set aside as matter of bookkeeping for such a use but until actually appropriated to that purpose they remain, it seems to us, profits and the corporation and its directors may deal with them as such. If they are used for the purpose of increasing the capital by the issue of new shares or if they are applied to the construction or repair of permanent works, this constitutes an effectual capitalization of them. *Minot* v. *Paine*, *supra*. *Rand* v. *Hubbell*, 115 Mass. 461. *D'Ooge* v. *Leeds*, 176 Mass. 558. *Gibbons* v. *Mahon*, 136 U. S. 549. On the other hand if they are used in the business of the corporation as floating capital, as it is sometimes termed, and for the time being are invested in stocks and securities so as to yield an income which goes into the general income, we think that such a use must be regarded as temporary in its nature and liable to be terminated by the directors at any time when they see fit either by a permanent investment and withdrawal for the purposes of capital or by a distribution amongst the stockholders by way of dividend; and if terminated in the latter way we think that the dividend so declared must be regarded as a dividend of income or profits and not of capital. Whether if accumulated profits are once devoted to permanent capital purposes, they can be set free and distributed as income amongst the stockholders by the paying in of an equal amount as capital as seems to be intimated by Lord Watson in *Bouch* v. *Sproule*, 12 App. Cas. 385, 402, 403, and as argued by the life tenants it is not now necessary to consider or decide.

In the present case as already observed the directors in the vote declaring the dividend described the assets that were distributed as "representing accumulated and undivided profits of the company." We see no reason to doubt that that was a true description of them, and that the dividend was intended to be and was a dividend of them as profits, and that the directors had a right to make it as such. Furthermore, it is agreed, if that is material, that the capital was not impaired by the distribution, but the assets remained several times greater than the original capital after the dividend.

The result is that whether we adopt the rule for which the life tenants contend that cash dividends are to be regarded as

income however large except where upon its face the transaction shows that the dividend should be treated as a dividend of capital, or whether we consider the facts that have been argued in regard to the origin and history of the assets which furnished the dividend, we are of opinion that the dividend was a dividend of income and not of capital or principal and that the life tenants are entitled to it.

Decree accordingly.

J. B. Warner, for the life tenants.

H. E. Warner, for the remaindermen.

ELIZABETH SCOLLARD & another *vs.* FRANK NORMILE.

Suffolk. January 20, 1902. — May 22, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Easement, Equitable restriction.

One who has unintentionally violated a restriction in his deed by a projection over a building line cannot enforce the restriction against an adjoining owner who also in good faith has committed a similar violation.

BILL IN EQUITY, filed November 8, 1900, to restrain the defendant from continuing the erection of his house within ten feet of the line of Calumet Street in Boston and for an order requiring the defendant to move back his house and to pay the plaintiffs damages.

At the hearing in the Superior Court before *Bell*, J., it appeared, that the plaintiffs' deed was dated May 16, 1893, and the defendant's deed April 25, 1896. Both contained restrictions requiring that no building should be erected or maintained within ten feet of Calumet Street. The restrictions in the defendant's deed were to remain in force for fifteen years from June 1, 1894. The houses both of the plaintiffs and the defendant projected into the restricted space and in a similar manner. The plaintiffs did not know this until after the filing of their bill. The plaintiffs built in 1893, and the defendant in 1900, his house being nearly completed when the bill was filed. In both cases the architects

and builders were instructed to erect the houses ten feet back from the street, and in both cases the violation of the restriction was unintentional.

The judge signed a statement of the facts found by him, and made a decree dismissing the bill; and the plaintiffs appealed.

W. P. Hale, for the plaintiffs.

P. O'Loughlin, (*T. J. Ahern* with him,) for the defendant.

HAMMOND, J. Upon the facts found by the judge and those shown on the plan, there is no equity in the case of the plaintiffs. Both parties have violated the restrictions, and in each case the violation was not wilful but unintentional. In view of these circumstances, the kind and degree of the respective violations and the short time remaining of the life of the restrictions, it would be plainly inequitable to compel the defendant to move or alter his building at the request of the plaintiffs, the situation of whose building, so far as respects the restrictions, is nearly, if not fully, as objectionable as that of the defendant. See *Bacon* v. *Sandberg*, 179 Mass. 396, and authorities cited therein as to the principles which should govern in such a case.

Decree affirmed.

OLD COLONY TRUST COMPANY *vs.* GREAT WHITE SPIRIT COMPANY & others.

Suffolk. February 25, 1902. — May 22, 1902.

Present: KNOWLTON, MORTON, LATHROP, BARKER, & HAMMOND, JJ.

Mortgage. Equity Pleading and Practice.

A court, having made a decree in equity ordering a foreclosure sale, may make an order postponing the sale without notice to the parties. The rights of all parties would be protected sufficiently by notice of the time to which the sale was adjourned.

A departure by a special master conducting a foreclosure sale from the terms of the decree ordering the sale, does not require that the sale should be set aside, unless also it appears, or there is good reason to believe, that the party complaining has been injured thereby, and has a right to be heard concerning the matter of which he complains. In such a case the court can change or modify the decree at any time before it is carried into effect, and, after it is carried into effect, can confirm the doings of its agent, provided the rights of parties interested have not been affected to their injury.

MORTON, J. This is a bill in equity to foreclose a mortgage. The case was before this court in 178 Mass. 92 on an appeal from a decree authorizing the foreclosure. The jurisdiction in equity was sustained and the decree was affirmed. A special master was appointed pursuant to the decree to make sale of the mortgaged property and he has done so. The case comes here now on an appeal from and exceptions to an order authorizing the master to adjourn the sale, and on an appeal from a decree confirming the sale.

The special master advertised and gave notice of the sale of the property "at the Real Estate Exchange and Auction Board, 7 Exchange Place, in the City of Boston," "on Monday the twentieth day of May, 1901, at eleven o'clock in the forenoon." Shortly before the hour appointed for the sale, parties, representing about three quarters of the bonds secured by the mortgage, appeared before a justice of this court in chambers and made a motion that the sale be postponed to June 20. No notice of the motion was given to the mortgagor or other parties interested, and the parties making it were not parties to the suit, and the counsel representing them were not counsel of record. The special master was present, and was consulted by the court, and stated that, while he did not deem it his duty to oppose the motion, he questioned whether so long a postponement was expedient. An order was entered authorizing the adjournment to June 20, and the sale was postponed, and the master duly sold the property at the time and place appointed, notice having been given of the adjournment. The decree of foreclosure authorized the master to adjourn and postpone the sale, and to proceed with the sale on any day to which the sale was adjourned, giving at his option such further notice as he might think proper.

The order of the court did not in terms require an adjournment, but simply authorized it, and it is possible to construe what was done as done by the master with the sanction of the court. But, even if the order was compulsory, the matter was of such a nature that the court might properly pass upon it without notice on the application of any person interested, whether a party to the suit or not, if of opinion that nothing was to be gained by notice. The rights of all parties would be sufficiently protected by due notice or information of the time to which the sale was

adjourned; and there is nothing to show that they did not have such notice or information. See *Goodell* v. *Harrington*, 76 N. Y. 547.

In regard to the appeal from the decree confirming the sale, the mortgagor objects that there was a material variance between the sale authorized by the decree and the actual sale, 1st, because the property advertised for sale comprised only property in the possession of the mortgagee, whereas the decree directed the property "covered by said mortgage and supplementary mortgages" to be sold, and directed it to be sold as an entirety; and 2d, because the property was sold subject to the lien of Nutter and Seabury, whereas the plain implication of the decree was that it should be sold free from any lien that they might have and that their lien if they had any, should be transferred to the proceeds. It also objects that the master acted in excess of his authority in fixing the time and place of sale. In regard to this last, we deem it necessary only to observe that the decree expressly gave the master power to fix the time of the sale, and by necessary implication also the power to fix the place of the sale. In respect to the other two objections, assuming that there was a variance in the particulars referred to between the decree and its execution, it plainly was of such a nature that the court could at the outset have authorized the master to do what he did do, and it could ratify and confirm what it might have authorized if such a course would not interfere with or prejudice the rights of the parties interested. The judge found as a fact that none of the parties to the cause were injured by the variation, if there was any, and that it was not substantial. Unless therefore any variation or departure from the terms of the decree required that the sale should be set aside the confirmatory decree must stand. But irregularities on the part of a master, or a departure from the terms of the decree in conducting a sale do not require that the sale should be set aside, unless it also appears, or there is good reason to believe, that the party complaining has been injured thereby, and also has a right to be heard concerning the matter of which he complains. *Farmers' Loan Co.* v. *Oregon Pacific Railroad*, 28 Ore. 44. Freeman on Void Judicial Sales, § 43. *Calvert* v. *Godfrey*, 6 Beav. 97. The case presented is not that of a donee of a power who is bound to follow strictly the

provisions of the power, or of an officer selling on execution for instance, who also is bound to follow strictly the requirements of the statute, but is that of a special master in chancery appointed to make sale of certain property under a decree in a suit in equity. In such a case the court can change or modify the decree at any time before it is carried into effect, and after it is carried into effect can confirm or ratify the doings of its agent, as in the case of receivers and other agents if they have departed from or exceeded the authority conferred upon them, provided the rights of parties interested have not been prejudiced or affected injuriously thereby. *Meeker* v. *Evans*, 25 Ill. 322. *Nebraska Loan & Trust Co.* v. *Hamer*, 40 Neb. 281, 286. Beach on Receivers, (2d ed.) 252, 378. In the present case the mortgagor had a right to be heard and was heard on the question of confirming the sale. The judge found as already observed that it was not injured by the alleged variation from the terms of the decree. In view of this finding, it is not necessary to consider whether what was done constituted a variation, or whether, if it did, it was a material or immaterial variation.

The result is that we think that the exceptions should be overruled and the decree affirmed. *So ordered.*

W. H. Dunbar & J. G. Palfrey, for the Great White Spirit Company.

C. K. Cobb, for the plaintiff.

PATRICK DRISCOLL *vs.* GEORGE H. TOWLE.

Suffolk. March 5, 6, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Master and Servant.

In an action against a defendant engaged in a general teaming business, the only question was whether the driver of the horse and wagon that knocked down the plaintiff was the servant of the defendant. The driver's only contract of employment was with the defendant who paid him his wages, but for some time he had been carrying property for an electric lighting company under some arrangement made with that company by the defendant. Every morning the driver reported with his horse and wagon to the company and after carrying out its

orders all day returned at night to the defendant's stables. Sometimes he gave help, outside of driving his wagon and loading and unloading it, in pulling up arms on electric light poles or in pulling up machinery and the like. When the accident happened he was on his way to get some arms in pursuance of an order from the foreman of the company. *Held*, that there was evidence to go to the jury, that the driver was the servant of the defendant.

TORT for injuries from being struck and knocked down by some part of a horse or wagon of the defendant through the negligence of the driver alleged to be the defendant's servant, while the plaintiff was returning to the sidewalk after picking up a handkerchief dropped by the driver of a coal team. Writ dated October 21, 1899.

In the Superior Court the case was tried before *Maynard*, J. At the close of the plaintiff's evidence, the judge, at the request of the defendant, ruled that the plaintiff could not maintain his action, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

G. F. Ordway, (*J. H. Sherburne, Jr.* with him,) for the plaintiff.

G. C. Dickson, for the defendant.

HOLMES, C. J. This is an action for personal injuries caused by the plaintiff's being struck in the street by a horse or wagon driven by one Keenan. At the trial the judge directed a verdict for the defendant, and the plaintiff excepted. The only question is whether there was any evidence that Keenan was the defendant's servant.

The defendant "was engaged in general teaming business in Boston." He owned the horse and wagon, and employed Keenan and paid him his wages. Keenan's only contract of employment was with him. For some time, however, Keenan had been carrying property for the Boston Electric Light Company, under some arrangement between the latter and the defendant. The general course of business, or at least that adopted on the day of the accident, was this. Early in the morning Keenan took the horse and wagon from the defendant's stables and reported to the electric light company. An employee of that company would give him his orders as to what to do and where to go, and he spent the day in carrying these orders out. Sometimes he would help pull up arms on the poles, or pull up machinery, and the like. In driving, if he was directed to drive fast, he would

drive fast, and if told that he had time enough, he would take his time, but he chose his own route and had exclusive management of his horse. At night he returned to the defendant's stables. He harnessed and unharnessed the horse, and fed it at noon. At the moment of the accident he was going to get some arms in pursuance of an order from the foreman of the electric light company.

We are of opinion that these facts are at least evidence that Keenan was the defendant's servant.

It is true, of course, that a person admitted to be in the general employment of one may be lent to another, (with his own consent, *Delaware, Lackawanna & Western Railroad* v. *Hardy*, 30 Vroom, 35,) in such a way as to become the servant of that other for the occasion or for the time. Many cases have been decided on this ground. They generally depend upon the nature of the contract or arrangement, express or implied, between the general master and the third person. *Linnehan* v. *Rollins*, 137 Mass. 123. *Hasty* v. *Sears*, 157 Mass. 123. *Coughlan* v. *Cambridge*, 166 Mass. 268, 277, 278. *Samuelian* v. *American Tool & Machine Co.* 168 Mass. 12. *Donovan* v. *Laing, Wharton, & Down Construction Syndicate*, [1893] 1 Q. B. 629. *Rourke* v. *White Moss Colliery Co.* 2 C. P. D. 205. *Higgins* v. *Western Union Telegraph Co.* 156 N. Y. 75. But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign, — as the master sometimes was called in the old books. *Dutton* v. *Amesbury National Bank*, *ante*, 154.

In this case the contract between the defendant and the electric light company was not stated in terms, but it fairly could have been found to have been an ordinary contract by the defendant to do his regular business by his servants in the common way. In all probability it was nothing more. Of course in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the

party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act.

Of course the chances are that some orders will be given which are not strictly within the contract of the master. That is to be expected from the relative positions of the servant and the other party. If the latter has something that he wants done and sees a working man at hand, he is likely to ask him to do it, and if it is within the penumbra of his business the servant is likely to obey. While he thus goes outside his master's undertaking and his own contract with his master, he ceases to represent him, *Brown* v. *Jarvis Engineering Co.* 166 Mass. 75, and he may make the other liable for his acts, *Kimball* v. *Cushman*, 103 Mass. 194, but he does not on that account become the servant of his master's contractee for all purposes, or when he returns to the work which his master agreed to perform. The fact that Keenan sometimes gave help outside of loading or unloading his wagon could not be more than evidence, if it is that, of an arrangement giving the company more than ordinary control over him. At the most it was for the consideration of the jury and did not justify directing a verdict for the defendant as matter of law. *Preston* v. *Knight*, 120 Mass. 5. *Jones* v. *Scullard*, [1898] 2 Q. B. 565.

In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street. *Huff* v. *Ford*, 126 Mass. 24. *Reagan* v. *Casey*, 160 Mass. 374, 379. *Jones* v. *Liverpool*, 14 Q. B. D. 890. *Waldock* v. *Winfield*, [1901] 2 K. B. 596. *Quarman* v. *Burnett*, 6 M. & W. 499. *Laugher* v. *Pointer*, 5 B. & C. 547, 558. *Murray* v. *Dwight*, 161 N. Y. 301. *Lewis*

v. *Long Island Railroad*, 162 N. Y. 52, 66. *New York, Lake Erie & Western Railroad* v. *Steinbrenner*, 18 Vroom, 161. *Joslin* v. *Grand Rapids Ice Co.* 50 Mich. 516. *Little* v. *Hackett*, 116 U. S. 366.

Exceptions sustained.

HENRY H. SAVAGE *vs.* H. OWEN GOLDSMITH & another.

Suffolk. March 6, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Evidence, Burden of proof. *Bills and Notes.*

A ruling, that the maker and indorser sued on a promissory note must establish the fact that the plaintiff took the note without paying value for it before they can show fraud in the inception and delivery of the note, is wrong. The reverse is correct, that upon proof that a note was obtained or put into circulation by fraud, the indorsee, in order to recover, must show that he gave value for it in good faith before maturity.

MORTON, J. This is an action upon a promissory note against the maker and the first indorser after the maker. The signatures were admitted and the plaintiff put in the note and protest and rested. The defendants thereupon proposed to introduce testimony to show fraud in the inception and delivery of the note. But the judge ruled that the defendants could not show fraud until they had first established the fact that the plaintiff took the note without paying value for it. The defendants excepted to this ruling, and, because of it, called the plaintiff and the broker who negotiated the note to him to show if they could that the plaintiff did not take the note for value. This was all of the evidence introduced by the defendants and at its conclusion the defendants rested and the judge directed a verdict for the plaintiff. The case is here on exceptions by the defendants to these rulings.

We think it is plain that the ruling that the defendants could not show fraud in the inception and delivery of the note till they had established the fact that the plaintiff took the note without paying value for it was erroneous. It is expressly held

in *Sistermans* v. *Field*, 9 Gray, 331, 337, "that upon proof that a promissory note . . . was obtained or put in circulation fraudulently," before an indorsee can recover upon it, he "must show that he gave value for it; and . . . it is not first incumbent on the defendant to show the contrary." See also *Tucker* v. *Morrill*, 1 Allen, 528; *Smith* v. *Edgeworth*, 3 Allen, 233; *Smith* v. *Livingston*, 111 Mass. 342; *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158; *National Revere Bank* v. *Morse*, 163 Mass. 383.

Upon proof that the note was obtained or put in circulation fraudulently, the burden was upon the indorsee to show that he took it for value and in good faith before maturity. *Smith* v. *Livingston*, *supra*, 344.

No objection appears to have been made that the answers did not set up fraud. The answer of the defendant Goldsmith alleged it in terms, and the ruling appears to have been made on the uncontroverted assumption that it was sufficiently alleged in both answers, and was a defence common to both defendants. The ruling also appears to have been made without regard to the question whether the evidence which the defendants proposed to introduce would sustain the charge of fraud or not, and without requiring any statement of it. The objection therefore, that it does not appear, what the answers would have been to the questions that were put and excluded is not valid.

Exceptions sustained.

W. R. Buckminster, for the defendants.

M. E. S. Clemons, for the plaintiff.

WILLIAM J. STODDARD *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 6, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Carrier, Of Passengers. *Negligence*, On railroad.

In this case it was assumed, that a postal clerk, who had paid no fare, unloading mail in a postal car, which recently had been detached from a train on its arrival at its final station and was standing on a side track, had originally and still had the rights of a passenger.

A railroad company is not liable for an injury to a postal clerk unloading mail in a postal car recently detached from a train of the defendant on its arrival at the central station in New York, while the car is standing on a side track and is there run into by a car of another railroad company turned upon the same side track through the negligence of a servant of the company owning it.

TORT for personal injuries. Writ in the Municipal Court of the City of Boston dated February 2, 1901.

On appeal to the Superior Court the case was tried before *Hardy*, J., who ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. M. Palmer, for the plaintiff.

J. L. Hall, for the defendant.

HOLMES, C. J. This is an action for personal injuries. The plaintiff was a United States postal clerk running from Boston to New York, and paying no fare. U. S. Rev. Sts. § 4000. At the time of the accident his mail car had reached the New York station and, after remaining there five or six minutes, had been placed upon a side track and had been there ten minutes. By the negligence of a servant of the New York Central and Hudson River Railroad, a car which should have been shunted to another track was turned on to the side track and ran into the postal car. The plaintiff was in the postal car, unloading the mail, and was hurt. At the trial the judge directed a verdict for the defendant, and the case is here on exceptions.

We are of opinion that the direction was right. Assuming for the purposes of decision that the plaintiff originally and still

had the rights of a passenger, the facts disclose no breach of duty on the part of the defendant. The injury was caused by the servant of an independent company, over whom the defendant had no control. So far as appears, the New York Central road may have had a right to use the station, which was quite independent of the New York, New Haven and Hartford company. But even if its right to be present depended on a contract with the latter, it would make no difference in our judgment. The liability of a carrier to a passenger is based upon fault, however high the criterion of duty may be placed. It is said that the defendant's duty was to provide a safe station. It did so. Its duty did not extend to insuring the plaintiff against the wrongful acts of third persons while he might be there, whether those acts took the form of a wilful assault and battery or of a negligent bringing of force to bear upon his person. *Brooks* v. *Old Colony Railroad*, 168 Mass. 164. Short of such a general duty of insurance the defendant cannot be held. For although the accident occurred in the running of a car upon a railroad track, no way appears in which the defendant could have prevented it.

There have been suggestions in some cases looking in the direction of the defendant's liability. *Railroad Co.* v. *Barron*, 5 Wall. 90, 104. *Murray* v. *Lehigh Valley Railroad*, 66 Conn. 512. But even if it were shown, as it is not, that the defendant had done an act which in a remote sense made the accident possible, such as making some contract of letting or hiring with the New York Central road, to our mind it confuses all principles of liability based upon fault when such an act is relied upon as a sufficient ground of responsibility. Remote acts of a defendant always can be shown without which the accident would not have happened. But the question is whether they are near enough to be regarded as the cause. A lease does not make either party the servant of the other in fact, and there seems to be no ground for resorting to fiction. The contract of carriage is interpreted as applying to the instrumentalities of carriage even when belonging to others, so far as to make the carrier answerable for their negligence, but the liability still stands on fault and the best considered cases agree that there is no reason for extending it to the incursions of other carriers not

under the defendant's control. *Wright* v. *Midland Railway*, L. R. 8 Ex. 137. *Sprague* v. *Smith*, 29 Vt. 421. See *Daniel* v. *Metropolitan Railway*, L. R. 5 H. L. 45.

Exceptions overruled.

JOHN MEANEY *vs.* JOHN P. KEHOE.
JOSEPH MEANEY *vs.* SAME.

Suffolk. March 7, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Practice, Civil, Issues of fact, Parties. *Abatement. Pleading*, Variance.

Conflicting evidence is for the jury.

One of two persons owning a horse and wagon in common may recover for an injury to the property in a separate action, where nonjoinder of the other owner is not pleaded in abatement.

The allegations in a declaration of injury to "the plaintiff's carriage" and "the plaintiff's horse" are satisfied by proof of any interest sufficient to support an action.

TWO ACTIONS OF TORT for injuries to the person of each plaintiff and to a horse and buggy. Writ in the Municipal Court of the City of Boston dated September 25, 1900.

On appeal to the Superior Court the cases were tried before *Stevens*, J. At the close of the evidence, the defendant requested the judge to make in each action the following rulings:

1. There is no evidence of negligence on the part of the defendant. 2. The plaintiff in this action cannot recover for the injury to the horse and carriage. 3. The plaintiff cannot recover under the declaration in this action for injury to the horse and carriage, unless he was the sole owner of the horse and carriage described in the declaration. 5. There is no evidence of reasonable care on the part of the plaintiff.

There was a fourth request for a ruling which was given by the judge. He refused to give the others, and as to the second and third, instructed the jury that the claim of each plaintiff was only for his own personal injury and for half the value of the horse and buggy.

The jury returned a verdict for the plaintiff in each case for the sum of $111; and the defendant alleged exceptions.

A. Berenson, for the defendant.

W. H. Brown, (*J. F. Burke* with him,) for the plaintiffs.

HOLMES, C. J. These are actions for injuries to person and property caused by a collision between two wagons. According to the defendant's testimony the plaintiffs, who were driving a fast horse returning from Revere Beach, and who admitted that they had been racing, came down upon him at a wicked rate of speed and ran into him without his fault, as he was driving slowly homeward from his place of business, — a liquor saloon. The plaintiffs on the other hand testified that they were driving slowly when they saw the defendant coming toward them at a gallop, and that thereupon they drove their wagon as close to their side of the way as they could but did not succeed in escaping the defendant. The case was as clearly and solely a case for the jury as it is possible to imagine, and we are at a loss to conceive why it should have been brought here.

When the evidence was all in, the defendant objected that the plaintiffs could not recover under the declaration unless they were the sole owners of the horse and vehicle. It seems that the two plaintiffs owned the horse and wagon in common, but each declared separately and averred an injury to the plaintiff's person and to his horse and carriage. If the nonjoinder of the other owner had been pleaded in abatement, it would have presented an amusing dilemma, as the injuries to the persons of the plaintiffs were torts distinct from each other and yet not to be separated from whatever claim they respectively had for injury to property. *Braithwaite* v. *Hall*, 168 Mass. 38. But when the evidence was in it was too late to take that objection, if there is anything in it. *Sherman* v. *Fall River Iron Works Co.* 5 Allen, 213. The failure to prove either plaintiff's sole ownership was not a fatal variance under a general allegation of injury to the plaintiff's property. Without going into the learning of the discussions concerning "*sua*" in the early writs, it is accurate enough for practical purposes to say that nowadays and here the words "the plaintiff's carriage" and "the plaintiff's horse" are satisfied by proof of any interest sufficient to support an action. 1 Chitty Pl. (7th ed.) 394. See Pub. Sts. c. 214, § 14; R. L. c. 219, § 9.

Exceptions overruled.

WILLIAM HAYWARD *vs.* DORCAS A. LANGMAID.

Suffolk. March 7, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Agency, Ratification. *Practice, Civil*, New trial. *Discretion of Court.*

In order that the act of another may become binding by ratification, it is necessary that the act should have been done by one who in fact was acting as an agent, but it is not necessary that he should have been understood to be such by the party with whom he was dealing.

In deciding that no ground appeared on which it could be held as matter of law that the presiding judge erred in denying a certain motion for a new trial, it was assumed, without deciding, that the discretion in such a case is not unlimited, and that circumstances might arise under which the exercise of the discretion could be revised, although the general rule is that it is not subject to revision on exception or appeal.

CONTRACT for a balance due for the construction of a double house in Watertown and also for a small amount for work done and materials furnished in repairs upon other property. Writ dated January 19, 1893.

At the trial in the Superior Court before *Richardson*, J., it appeared, that the house was constructed under a contract in writing between the plaintiff and Webster C. Langmaid, to furnish materials and erect a double house on land of the defendant, a widow, the mother of Webster C. Langmaid.

There was evidence, that Webster C. Langmaid in making the contract did so as the agent of the defendant; that he did not disclose to the plaintiff that he was acting as an agent, and that the plaintiff supposed that Webster C. Langmaid was the owner of the land upon which the house was to be erected, and, relying upon these facts, signed the contract, furnished the materials and constructed the house, and that he did not learn until after the house was constructed that Webster C. Langmaid was not the owner of the land. There were certain other items in the declaration outside of the written contract amounting to about $82, for work done and materials furnished on other property of the defendant at the request of Webster C. Langmaid; and the plaintiff offered evidence tending to show that in order-

ing this work Webster C. Langmaid acted as the agent of his mother and was acting within the scope of his authority as such agent. There was evidence put in by the plaintiff which he contended, not only tended to prove such agency, but also tended to show that, if Webster C. Langmaid had in any respect exceeded his authority, the defendant had ratified his acts. It was admitted by the defendant that if the plaintiff was entitled to recover anything, he should recover for the full amount claimed.

The case had been referred to an auditor, who filed a report, finding for the plaintiff. The plaintiff read the report to the jury and rested.

The defendant's counsel in his opening to the jury stated, that he proposed to show that Chase Langmaid, deceased, husband of the defendant and father of Webster, before he died conveyed all his property to the defendant, and that after his death the defendant and her two children, Webster C. Langmaid and Helen Kenny, made a certain agreement in regard to the division of the estate, which the defendant contended showed that Webster in making the contract for the house was acting for himself and not for his mother.

The defendant then called Webster C. Langmaid. After this witness had testified to the death of his father, the previous conveyance of all his estate to the defendant, and the making of the agreement between the defendant, Helen Kenny and himself, the plaintiff's attorney having asked if the agreement in question was in writing, the witness was asked whether or not the agreement was in writing, and replied that it was, and that he had given it to his attorney, Fred E. Crawford. He then was asked to state the terms of the agreement, but the question was excluded. Later, being recalled, he reiterated his statement that the agreement was in writing. Thereupon the defendant's attorney moved to discontinue or suspend the trial of the action, on the ground that he had understood that the agreement in question was verbal; that the evidence of the witness, Webster C. Langmaid, was a complete surprise to him; that by reason of the testimony he was unable to prove the terms of the agreement; and that he might produce Mr. Crawford, who was then in New Hampshire. The judge overruled the motion. The witness was then examined further in respect to other facts indicated in

the defendant's opening to the jury, and the defendant rested. Neither the defendant nor Helen Kenny were called, though both lived in Boston; and no statement was made that there was any desire to call them or to explain their absence.

The plaintiff's counsel in rebuttal called the plaintiff and other witnesses, who testified to facts which he contended tended to prove an original authority from the defendant to Webster C. Langmaid to construct the house and to procure the performance of the other work, as her agent; or, in case of his having exceeded his authority as such agent, a ratification of his acts.

The jury found for the plaintiff in the sum of $2,754.09.

The defendant filed a motion for a new trial on the following grounds: 1. "Because the defendant was surprised by the testimony of Webster C. Langmaid, a witness called by the defendant, in that said witness testified that the general agreement or understanding between the defendant, Helen Kenny, and himself, respecting the division of Chase Langmaid's estate, was in writing, whereas, in truth and in fact, the same was not in writing; and said witness had led the defendant and her counsel to believe that he would testify that the same was not in writing. 2. Because the judge refused to instruct the jury, as prayed for by the defendant, that the meaning of ratification in law is the adoption of an act which has been done by one purporting or assuming to act as agent."

In support of the motion the defendant filed certain affidavits. The judge overruled the motion; and the defendant alleged exceptions to the order. The defendant contended that the judge improperly exercised his discretion in refusing the motion for a new trial.

G. L. Wilson, (*E. A. Gilmore* with him,) for the defendant.

J. Bennett, for the plaintiff.

MORTON, J. There are two questions in this case; 1st, whether the instruction that was requested, "that the meaning of ratification in law is the adoption of an act which has been done by one purporting or assuming to act as agent;" and 2d, whether the motion for a new trial was rightly overruled.

It is evident, we think, that the instruction was understood, and rightly, by the presiding judge to mean that it was neces-

sary to a ratification, that the act should have been done by one who represented or held himself out as an agent in respect to the matter to which it related. But such is not the law. It is necessary in order to a ratification that the act should have been done by one who was in fact acting as an agent but it is not necessary that he should have been understood to be such by the party with whom he was dealing. *Sartwell* v. *Frost*, 122 Mass. 184. *Ford* v. *Linehan*, 146 Mass. 283. *New England Dredging Co.* v. *Rockport Granite Co.* 149 Mass. 351. *Schendel* v. *Stevenson*, 153 Mass. 381. The request was therefore properly refused.

We assume in favor of the defendant, without deciding, that the discretion of the presiding judge in granting or denying a motion for a new trial is not an unlimited discretion, but that circumstances may arise under which it may be revised. The general rule is that it is not subject to revision on exception or appeal. *Freeman* v. *Boston*, 178 Mass. 403. *Coffing* v. *Dodge*, 169 Mass. 459. *Behan* v. *Williams*, 123 Mass. 366.

In the present case we see no ground on which it can be held as matter of law that the judge erred in denying the motion. He may have been of the opinion that the defendant had not exercised due diligence. She was a party to the alleged agreement but there was no offer on her part to testify or to produce the other party to it. It would have been extraordinary to grant a new trial under such circumstances because of alleged surprise at the testimony of a witness, and so far as the exceptions show the only witness, whom she called.

Exceptions overruled.

ANNIE A. DIXON *vs.* ELLA M. AMERMAN.

Suffolk. March 10, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Action, Survival.

An action by a wife against another woman for adultery with the plaintiff's husband causing loss of his society does not survive under Pub. Sts. c. 165, § 1. R. L. c. 171, § 1.

TORT by one woman against another for criminal conversation with the plaintiff's husband and consequent loss by the plaintiff of his society. Writ dated February 17, 1899.

In the Superior Court the executor under the will of the defendant, who had been cited in and appeared specially, suggested the death of the defendant since the bringing of the action, and moved that the action be dismissed. The motion was heard by *Braley*, J., who granted the motion and made an order that the action be dismissed; and the plaintiff alleged exceptions.

C. H. Stebbins & C. E. Burbank, for the plaintiff.

E. A. Gilmore, for the defendant.

HOLMES, C. J. This was an action by a wife against another woman alleging adultery with the plaintiff's husband and consequent loss of his society. See *Neville* v. *Gile*, 174 Mass. 305; *Houghton* v. *Rice*, 174 Mass. 366. The defendant died, the Superior Court dismissed the action on motion, and the plaintiff appealed. The only question is whether the action survives by force of Pub. Sts. c. 165, § 1, (R. L. c. 171, § 1,) as an action "of tort for assault, battery, imprisonment or other damage to the person."

It would seem that nothing could make it plainer than the words themselves do that this case is not within them. The words "or other damage to the person" seem to have been adopted in the General Statutes, Gen. Sts. c. 127, § 1, as an equivalent for St. 1842, c. 89, § 1, which enacted that "the action of trespass on the case, for damage to the person, shall hereafter survive." This was by way of addition to the Rev. Sts. c. 93,

§ 7, which embraced only "assault, battery, or imprisonment," and obviously it meant only to make the survival of certain types of wrongs independent of the form of the action. In the language of Chief Justice Shaw, "This manifestly extends only to damage of a physical character, as by negligence of carriers, towns, or the like." *Smith* v. *Sherman*, 4 Cush. 408, 413. The same principle was stated in *Nettleton* v. *Dinehart*, 5 Cush. 543, where it was held that an action for malicious prosecution did not survive, and has been repeated ever since. *Norton* v. *Sewall*, 106 Mass. 143, 145. *Wilkins* v. *Wainwright*, 173 Mass. 212, 213. In *Walter* v. *Nettleton*, 5 Cush. 544, and *Cummings* v. *Bird*, 115 Mass. 346, it was held that an action on the case for a libel did not survive.

It is true that it has been said elsewhere that an action by a husband for debauching his wife was an action for a trespass to his person within an exception to the statutory survival of personal actions. *Clarke* v. *McClelland*, 9 Penn. St. 128. *Garrison* v. *Burden*, 40 Ala. 513. See *Noice* v. *Brown*, 10 Vroom, 569. But this proposition is simply a corollary of the common law doctrine that the wife is the husband's servant, 1 Roll. Abr. 2, pl. 7, and his chattel, Y. B. 19 Hen. VI. 31, pl. 59, 2 Roll. Abr. 546 (D), as well as a part of his person. 1 Bl. Com. 442. The wrong was a trespass because the wife had no power to consent. 3 Bl. Com. 139. See *MacFadzen* v. *Olivant*, 6 East, 387. It hardly needs to be observed that if these principles were invoked they would give the wife no comfort. The dismissal of the action was right under the settled construction of our statute.

Judgment affirmed.

JOHN WARD *vs.* BOARD OF ALDERMEN OF NEWTON & others.

Middlesex. March 10, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Certiorari. Assessments.

A writ of certiorari can issue only to correct errors of law apparent on the face of the record when properly extended. A respondent may be allowed to show by matter outside the record that justice requires the refusal of the writ, and if he does so the petitioner may reply to such extraneous facts, but he can do no more.

On a petition for a writ of certiorari directed to the aldermen of a city to quash assessments for street watering under St. 1897, c. 419, § 2, an allegation in the answer of the respondents, that they based their assessment upon a determination that it was less than the cost and less than the benefit conferred, cannot be controverted, and the fact that the answer goes on to allege facts justifying the judgment of the respondents does not make admissible evidence on the part of the petitioner to vary the record, the judgment of the board being conclusive except so far as the record may disclose that it was beyond their power or involved error of law.

HOLMES, C. J. This is a petition for a writ of certiorari to quash assessments for street watering in front of three tracts of the petitioner's land. The assessment was by the front foot under St. 1897, c. 419, § 2. The petition alleges facts which make it seem unlikely that the two lots on Beacon Street, which alone are in question before us, could have received any benefit, or at least a benefit equal to the amount of the tax, and the record proper discloses no preliminary adjudication by the board that there was such a benefit. The return or answer alleges, however, that the assessment was much less than the cost and less than the benefit conferred, and, what is more important, that the board based their determination upon these facts. The answer also sets forth various facts intended to corroborate the conclusion of the board, and the allegations are traversed and replied to by the petitioner. When the case came on for hearing, the petitioner desired to go into evidence upon these matters and excepted to a ruling which excluded it.

Both parties seem in their pleadings to have lost sight of the scope of certiorari as explained in *Farmington River Water*

Power Co. v. *County Commissioners*, 112 Mass. 206, and *Tewksbury* v. *County Commissioners*, 117 Mass. 563. The writ can issue only to correct errors of law apparent on the face of the record when properly extended. But, as the petition for the writ is addressed to the discretion of the court, a respondent sometimes may set up extraneous matters which show that, even if the record does disclose an error, still justice does not require it to be quashed. The application is made to a single judge, and he can go into evidence at that stage. If the extraneous matters are proved and are sufficient, the judge will secure justice by refusing to issue the writ. He necessarily deals with the matter in this way, outside the record proper, because at a later stage, when the writ has issued, such facts are immaterial. If the record discloses error, it must be quashed. There is no choice, except so far as the common law is modified by statute. Pub. Sts. c. 186, § 9. R. L. c. 192, § 4. Other instances are familiar to the law, in which, to avoid an improper use of technical rules, the court makes a preliminary inquiry of fact upon a matter which could not be pleaded. *Troeder* v. *Hyams*, 153 Mass. 536, 538. If then such facts are set up against the preliminary step of issuing the writ, the petitioner may answer them. But that is all. As a general rule at least, he cannot make a case outside the record; he can do no more than reply to matters touching the discretion of the court. This is obvious not only from the authorities cited but from the reason of the thing. For, supposing the writ to issue, nothing then would be before the court except the writ and the tenor of the record returned. This court could not retry the case but could only quash, or affirm, or in the statutory way modify the proceedings as they appeared bad or good on inspection. See further *Rutland* v. *County Commissioners*, 20 Pick. 71, 77, 78; *Mendon* v. *County Commissioners*, 5 Allen, 13, 16; *Commissioners of Highways* v. *Harper*, 38 Ill. 103, 107. Of course in a proper case the petitioner, upon alleging errors of law, may have made, by way of extending the record, such a statement of the material facts and the rulings of the inferior tribunal as will enable the court to determine the questions of law. *Mendon* v. *County Commissioners*, 2 Allen, 463.

In the case at bar, the allegation in the answer that the re-

spondents based their assessment upon a determination that it was less than the cost and less than the benefit conferred supplied a fact that did not appear unless by implication in the record proper. This allegation could not be and was not controverted. But when the answer went on to allege facts justifying the judgment of the respondents, it gave an invitation to retry their decision which the petitioner naturally was not slow to accept, but which the judge very properly declined to allow to be carried out. The judgment of the board was conclusive except so far as the record disclosed that it was beyond their power, unless for error of law in the finding and no such error was alleged.

The return appended a map of the premises assessed, and it appeared from inspection that one of the petitioner's lots had a front of three hundred and ninety feet and a depth varying from fifteen feet to eighteen inches. The single justice thought it manifest that the assessment on this lot could not be valid under *Sears* v. *Boston*, 173 Mass. 71, 79, 80, and *Weed* v. *Boston*, 172 Mass. 28, 32. With that we have nothing to do. But he rightly held that there was nothing before him to show that the other assessments were bad, as matter of law, under those decisions, or in minor points under St. 1897, c. 419, §§ 2, 3. See further *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, and following cases, through p. 404. The only question before us, however, is whether the exclusion of evidence in support of the petition and traverse was proper. For the reasons which we have given, we are of opinion that it was right.

Exceptions overruled.

J. E. Bates, for the petitioner.

W. S. Slocum, for the respondents.

ESTELLE J. SMITH *vs.* CHARLES DUNCAN.

Suffolk. March 11, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Evidence, Admission by silence. *Practice, Civil*, Exceptions.

In an action for being knocked down and run over by a pair of horses of the defendant in charge of a driver in his employ, a police officer may be allowed to testify, that after the accident he told the defendant that the driver had said to him that one of the horses was vicious and had run away before. The defendant fairly might be presumed to know whether the horse was vicious and if he suffered the statement to go uncontradicted the jury would be justified in treating his silence as an admission of what was said.

After a conversation a part of which is admissible has been given in evidence, an exception will not lie to the admission of the conversation as a whole. If the other part of the conversation is inadmissible, the objecting party must ask to have that part of it stricken out.

TORT for injuries from being knocked down and run over by a pair of horses of the defendant, who when left unattended standing across the street with feed bags on, eating their dinners, suddenly ran away and injured the plaintiff. Writ dated October 18, 1898.

At the trial in the Superior Court before *Richardson*, J., the jury returned a verdict for the plaintiff in the sum of $1,750; and the defendant alleged exceptions, stated by the court.

R. W. Nason, for the defendant.

W. A. Morse, J. F. O'Connell & J. R. Chandler, for the plaintiff, submitted a brief.

MORTON, J. This is an action to recover for personal injuries which the plaintiff received from being knocked down and run over by horses belonging to the defendant and driven by a man in his service. There was a verdict for the plaintiff. Several exceptions were taken by the defendant, but only one has been argued, and we therefore treat the others as waived. The exception that was argued relates to a matter of evidence. A witness, a police officer, called by the plaintiff, was allowed to testify against the defendant's objection to a repetition to the defendant, who arrived shortly after the accident, of a conver-

sation which he had had with the driver of the team. The conversation was, in substance, that he, the driver, was feeding the horses and had taken the bits out of their mouths; that they started to run and he tried to stop them and they got away and ran over the lady; and that he ought not to have taken the bridle off one of the horses because the horse was a vicious horse and had run away before. The driver was called as a witness by the defendant and denied that he made the statements testified to by the police officer, and the defendant also denied that the officer told him that the driver had said the horse was vicious, or that he ought not to have taken the bridle off.

We think that the exception cannot be sustained. It may be fairly presumed that the defendant as owner of the horse knew whether it was vicious or not, and if he suffered the statement that it was vicious to go uncontradicted or unchallenged, and the jury were of opinion that he naturally would have contradicted it if he could, they would be justified in treating his silence as an admission of the truth of what was said. *Greenfield Bank* v. *Crafts*, 2 Allen, 269. *Commonwealth* v. *Funai*, 146 Mass. 570.

As to the rest of the conversation, it is to be observed that the objection, so far as appears, was to the conversation as a whole, and the presiding judge was justified in so treating it. If, after the conversation was in, it appeared that a part of it was admissible, and a part of it was not, the defendant could have moved to have that part of it which was inadmissible stricken out, but so far as appears he did not ask to have that done. It is not necessary therefore to consider whether the rest of the conversation was admissible or not. Even if it was not, the defendant has lost his right to object to it.

Exceptions overruled.

ANSON M. LYMAN, administrator, *vs.* NATIONAL BANK OF THE REPUBLIC.

Suffolk. March 13, 14, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Executor. Pledge.

An executor has power to pledge the property of the estate in his charge, and if he unlawfully applies the proceeds to his own use this does not affect the rights of a *bona fide* pledgee.

If an executor borrows money from a bank pledging property of the estate in his charge to secure it and the money is placed to the credit of that estate, his drawing out the money by a check payable to his own order gives no notice to the bank of an intent to misapply the fund.

HOLMES, C. J. This is a bill brought by the administrator *de bonis non* of the will of Isaac N. Tucker, to compel the surrender of certain stock and bonds alleged to have been pledged unlawfully by the former executrix of the same will. The advance for which the pledge was given was made by the bank in good faith and placed to the credit of the estate. Afterward it was drawn out by the executrix upon a check to her own order. The money was applied to her private use, but this was without the privity of the defendant. The form of the check gave no notice of her intent to misapply the funds and imposed no duties on the bank. Some stress is laid on the statement in the agreed facts that the son of the executrix "applied in her name" for the loan, but the loan necessarily was made to her and it is plain that the president of the bank understood that it was for the benefit of the estate, or, according to popular phraseology, that it was made to the estate. The bill is based on a general allegation of illegality, and the only question necessary to be considered under either the bill or the evidence is the general one whether an executor has power to pledge the assets of the estate. This power is so fully established as an incident of his absolute control over the property that it is not necessary to do more than to cite a few of the cases. *Carter* v. *National Bank of Lewiston*, 71 Maine, 448. *Smith* v. *Ayer*, 101 U. S. 320, 326. *Scott* v. *Tyler*, 2 Dick. 712, 725. *M'Leod* v. *Drummond*,

17 Ves. 152, 154. *Russell* v. *Plaice*, 18 Beav. 21, 26. *Earl Vane* v. *Rigden*, L. R. 5 Ch. 663, 668, 670. 1 Wms. Ex. (9th ed.) 802, 803. Of course the contract of borrowing can bind the executor only personally in the first instance, but that is due to the fact that the estate as such is not a person and that the executor cannot contract otherwise. *Durkin* v. *Langley*, 167 Mass. 577, 578. See *Sumner* v. *Williams*, 8 Mass. 162. Compare *Mason* v. *Pomeroy*, 151 Mass. 164. The fact that it is in that form does not invalidate the pledge. See *Farhall* v. *Farhall*, L. R. 7 Ch. 123, 125.

It is said that the defendant was charged with notice of the contents of the will. If this be so, there is nothing in the will to cut down the power of the executrix. This property was part of the residue, and although the will provided that after the death of the executrix the residue should be held upon certain trusts, that fact did not limit her official authority. She did not act by virtue of her interest in the fund or as trustee, but under her prior and paramount title as executrix. Whether the gift of the testator's business enlarged her powers need not be considered. As we are of opinion that the plaintiff has no case on the merits, it is unnecessary to discuss anything else.

Bill dismissed.

A. M. Lyman, pro se.

C. M. Reed, for the defendant.

AMOS STONE & others *vs.* COMMONWEALTH.

JOSEPH STONE & others *vs.* SAME.

Suffolk. March 14, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Damages, For property taken under statutory authority. *Evidence*, Declarations of deceased persons, Competency, Admission. *Practice, Civil*, Conduct of trial. *Discretion of Court.*

In the assessment of damages for land and flats taken under statutory authority, the presiding judge may in his discretion admit evidence of what a substantial

sea wall on the premises is worth by the running foot, the jury being instructed that the market value of the property taken is the thing ultimately to be arrived at.

In the assessment of damages for land and flats including a wharf taken under statutory authority in 1893 and 1895, evidence may be admitted under St. 1898, c. 535, of a declaration of a deceased lessee of the wharf who occupied it from 1856 to 1882, that it would be safe to guarantee from eighteen to twenty feet of water there at flood tide. In view of the lessee's long use of the wharf his statement fairly might be taken to import that as a result of experience he had found there the depth of water stated, and the court could not say that the time referred to was too remote.

At a trial for the assessment of damages for land and flats including a wharf and berth for vessels taken by the Commonwealth under a statute and for damage to the petitioners' remaining land not taken, the Commonwealth contended that a new berth for vessels could be made by dredging and the damage to the remaining land thus diminished. To which the petitioners replied that they did not own the flats that would have to be dredged. In order to show that the petitioners had a right to dredge the flats, the Commonwealth offered in evidence a finding of a single justice of this court, in another case, to which the petitioners were parties and the Commonwealth was not a party, tending to show that the petitioners possibly had some title to the flats to be dredged. This was excluded. The Commonwealth also offered, for the same purpose, to show that the counsel who acted in the other case for some of the petitioners in this case argued and tried to prove in the other case that the flats to be dredged belonged to those petitioners. This also was excluded. *Held*, that the exclusions were right. *Whether*, the petitioners had in fact a right to dredge the flats required for the new berth, *quære*.

It is within the discretion of a presiding judge to regulate the reading of books to the jury, and this discretion was exercised properly in refusing to allow counsel in this case to read to the jury from the decision in *Stone* v. *Stone*, 179 Mass. 555.

TWO PETITIONS, filed April 1, 1895, and June 30, 1890, for the assessment of damages for land and flats including a wharf and berth for vessels, taken in behalf of the Commonwealth by the metropolitan sewerage commissioners under St. 1889, c. 439, and St. 1890, c. 270, on June 24, 1893, and July 13, 1895, and for damage to the petitioners' remaining land not taken.

The petitioners were the same or in the same interest in both cases, the second petition relating to the taking of an additional parcel of land and flats adjoining the first taking.

At the trial in the Superior Court before *Richardson*, J., the jury returned verdicts for the petitioners, upon the first petition in the sum of $24,065.64 and upon the second petition in the sum of $8,021.27; and the respondent alleged exceptions.

F. T. Hammond, for the respondent.

T. Hunt, for the petitioners.

HOLMES, C. J. These are petitions for the assessment of damages for land taken under St. 1889, c. 439, and St. 1890, c. 270. The cases come here on exceptions taken by the Commonwealth.

1. The property taken is part of that shown on the plans in *Stone* v. *Stone*, 179 Mass. 555, 564, and adjoins Malden bridge. It consisted of land and flats used for a wharf and berth for vessels, and was bordered by a substantial sea wall. The first exception is to the admission of evidence of what this wall was worth by the running foot. If the presiding justice had thought the evidence uninstructive and had excluded it, as in *Patch* v. *Boston*, 146 Mass. 52, 56, we should have been slow to revise the exercise of his discretion, but so far as we can judge he was right in thinking that it might be of some assistance to the jury, as in *Pierce* v. *Boston*, 164 Mass. 92, 97. He instructed the jury properly that market value was the thing ultimately to be arrived at. See *Allen* v. *Boston*, 137 Mass. 319, 321.

2. With regard to the depth of the water alongside the wharf, a witness was allowed to state that one Jotham Barry had told him that it would be safe to guarantee from eighteen to twenty feet of water there at flood tide. Barry had been lessee of the wharf from 1856 to 1882, and was dead. The evidence was let in under St. 1898, c. 535. It was excepted to, and is said to have been inadmissible because matter of opinion not fact, and because it referred to a time too long before the taking. But in view of Barry's relations to the wharf his statement fairly might be taken to import that he had found from eighteen to twenty feet at flood tide. In a matter like this, prophecy is only history inverted. We have no ground for saying that the statement referred to too remote a time.

3. On the question of damage to the remaining property not taken, the respondent contended that a new berth for vessels could be made by dredging. The petitioners replied that they did not own the flats that would have to be dredged, and this was in controversy. "As bearing upon the effect of the taking upon the remaining land," the respondent offered in evidence the finding of a single justice of this court, more or less in favor of the petitioners' title, in the case of *Stone* v. *Stone*, 179 Mass. 555. The offer, it will be observed, was of a finding, not of a

final decree, and of a finding in a case to which the respondent was not a party. *Boston Blower Co.* v. *Brown*, 149 Mass. 421, 424. *Barney* v. *Tourtellotte*, 138 Mass. 106, 107. *Davis* v. *Wood*, 1 Wheat. 6. 2 Taylor, Ev. (9th ed.) § 1682. In this court it is not contended that the decision was evidence of the fact found, but it is said that the fact of such a finding would affect the value of the remaining land. No doubt such an opinion with regard to the title would affect the value of land, but it is not the accepted mode of proving it.

4. As bearing upon the same question, an offer was made to prove that the lawyer who acted in *Stone* v. *Stone* for some of the present petitioners argued and tried to prove in that case that the flats last mentioned belonged to the petitioners. The exclusion of this evidence was proper. *Wilkins* v. *Stidger*, 22 Cal. 231, 238. *Elting* v. *Scott*, 2 Johns. 157, 162. See Langdell, Eq. Pl. (2d ed.) §§ 33, 34; *Wood* v. *Graves*, 144 Mass. 365.

5. The judge was warranted at least in refusing to allow counsel to read from the decision in *Stone* v. *Stone* to the jury. See *Commonwealth* v. *Austin*, 7 Gray, 51; *Commonwealth* v. *Hill*, 145 Mass. 305, 309.

6. The flats in question where the new berth would be dredged out were on the Everett side of the Penny Ferry property shown on the above mentioned plans, and the deeds upon which the petitioners' title depended were those before the court in *Stone* v. *Stone*. The petitioners asked for rulings denying their right to dredge and the respondent for rulings affirming it. The judge instructed the jury that so far as the boundaries were given no conveyance of flats on the Everett side of the line appeared; but he allowed and somewhat encouraged the jury to find that the petitioners had such rights as would warrant their dredging out the berth. The title by deed depends upon what was conveyed by the supplementary deed of the city of Charlestown to Gary, dated December 19, 1854, discussed in *Stone* v. *Stone*. It cannot be ruled as matter of law that a quitclaim of right, title and interest in flats, if any there be, which formerly belonged to the Penny Ferry, without covenants, found any flats at the material point to operate upon. The instruction was sufficiently favorable for the respondent.

Exceptions overruled.

EDWARD P. FLYE *vs.* JOHN G. BERRY.

Norfolk. March 14, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Mortgage, Of real estate. *Equity Jurisdiction. Equity Pleading and Practice*, Master's report.

The performance of the condition of a mortgage by payment before maturity leaves the mortgagee with no estate in the premises, and the mortgagor without any assignment or discharge is in of his old estate.

One who, knowing that a mortgage has been paid before its maturity, takes the satisfied mortgage from the mortgagor as security for a new debt, whatever may be his equitable rights as against the mortgagor, has no right to maintain a bill to redeem or to restrain foreclosure against the holder for value of a prior mortgage given by the same mortgagor upon the same property.

When a master, directed to hear two cases together, embodies in his report in one case facts and findings which relate to the other, this furnishes no ground for an exception, but the case in hand is to be decided upon such facts stated in the report as properly pertain to it.

BILL IN EQUITY, filed December 13, 1900, by the purchaser at a foreclosure sale under a mortgage given by one Lawrence McGinnis to the Roxbury Brewing Company on September 15, 1898, to restrain the foreclosure of a prior mortgage given by the same mortgagor to the Milford Co-operative Bank on September 17, 1895, and assigned by that bank to the defendant on June 28, 1899, alleging that on or about March 17, 1899, the debt secured by the defendant's mortgage had been discharged by insurance money received by the bank on account of buildings on the premises destroyed by fire, or, if anything remained due on the mortgage, praying to redeem.

The case was heard in the Superior Court upon a master's report and exceptions thereto. That court made a decree that the bill be dismissed and the defendant recover his costs; and the plaintiff appealed.

C. G. Keyes & C. D. Keyes, for the plaintiff.

G. B. Williams & W. Williams, for the defendant.

KNOWLTON, J. The question in this case is whether the plaintiff has a title on which he can maintain this suit. His title rests on a mortgage given by Lawrence McGinnis to the

Roxbury Brewing Company on September 15, 1898, to secure a note of $1,700 payable one year after that date. On June 15, 1899, the amount due on this note and mortgage was paid by the son of the mortgagor with the mortgagor's money, and the mortgage was assigned to one Bresnahan, who paid nothing for it but held it for the benefit of the mortgagor. This performance of the condition of the mortgage before the note became due left the mortgagee with no estate in or title to the premises, and he could convey nothing by an assignment; but the mortgagor, without any assignment or discharge, was in of his former estate. *Holman* v. *Bailey*, 3 Met. 55. *Grover* v. *Flye*, 5 Allen, 543. *Barnes* v. *Boardman*, 149 Mass. 106, 114, 115.

The reissue of the note with a stipulation that the mortgage should continue in force could not change the title. Nothing less than a new deed could create a new title. *Merrill* v. *Chase*, 3 Allen, 339. *Joslyn* v. *Wyman*, 5 Allen, 62. *Stone* v. *Lane*, 10 Allen, 74. *Douglas* v. *Stetson*, 159 Mass. 428. It was held in *Merrill* v. *Chase* and in *Joslyn* v. *Wyman*, *ubi supra*, that on a bill in equity to redeem a mortgage, if the mortgagor had agreed by parol that the mortgage might be held as security for advances beyond the amount originally secured by it, and if the advances had been made in good faith, the mortgagor would not be given a decree for redemption unless he would pay the amount so advanced, the doctrine being that he who seeks the aid of a court of equity must do equity. This is not such a case. The plaintiff who asks for a decree from a court of equity must show a right or title which the court recognizes as a foundation for affirmative action. If it were possible to maintain a bill of this kind on equitable considerations without any legal title, which we do not decide, the plaintiff in this case has no such right as against the defendant. Bresnahan, who took the assignment of this mortgage from the mortgagee at the time of the payment of it, had previously taken a conveyance of the equity of redemption under a foreclosure of a later mortgage, and this he did for the benefit of Lawrence McGinnis, the original mortgagor. The master finds that Jennings, under whom the plaintiff claims, took an assignment of this earlier mortgage from Bresnahan with knowledge that Bresnahan held both the mortgage and the equity for the benefit of Lawrence McGinnis,

and this was on June 28, 1899, before the note became due. This was equivalent to knowledge that the note had been paid and the condition of the mortgage performed by the mortgagor before it became due. Whether he knew how the payment was made and the course of proceedings by which Bresnahan came to hold it for Lawrence McGinnis, is immaterial. It is enough that he knew the mortgagor to be the owner of the note and mortgage which were held for his benefit. The master finds that he had reasonable cause to believe that the assignment to Bresnahan had been secured by John McGinnis, the son of Lawrence, by a payment made by John representing Lawrence. This is a case in which one, knowing that a mortgage has been paid before its maturity, takes the satisfied mortgage as security for a new debt. If this gives an equitable right against the mortgagor, the defendant has at least as high an equity, for he took for a valuable consideration, and, so far as appears, without knowledge that it had been satisfied, a first mortgage given by the same mortgagor upon the same property. The plaintiff's equity is not superior to that of the defendant and he cannot maintain this bill. Questions in regard to a possible estoppel in favor of the plaintiff against the original mortgagor are not material to this case and need not be considered.

The master was directed by the rule to hear this and another case together, and he has embodied in his report facts and findings which relate to the other case. This fact furnishes the plaintiff no good ground of exception. This case is to be decided upon such of the facts stated in the report as properly pertain to it.

The mortgage having been satisfied before maturity, it is unnecessary to consider the doctrine of merger, as distinguished from the doctrine already stated which leaves the mortgage a nullity upon performance of the condition according to the terms of the instrument.

Decree affirmed.

S. R. KING *vs.* ENSIGN E. HOWES.

Barnstable. March 14, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Equity Pleading and Practice, Amendment.

A plaintiff in equity after a master has filed his report may be allowed to amend his bill in any manner that will enable him to maintain it for the cause for which it was brought. Such an amendment properly may be allowed where the bill originally sought to restrain the foreclosure of a mortgage of personal property and to redeem from the mortgage, and by agreement of parties the property was sold while the case was pending.

KNOWLTON, J. The bill of exceptions presents the single question whether there was an error of law in the allowance of the plaintiff's motion to amend his bill. The bill was brought to prevent the foreclosure of a mortgage of personal property and to obtain a decree for the redemption of it, on the ground that the mortgagee had refused to perform his contract, which was an important part of the consideration for the note and mortgage and for the payment of a sum of money made when the note and mortgage were given. We may assume upon the findings of the master that the plaintiff would have been entitled to the relief sought if the property had remained in the hands of the defendant until the final hearing of the case. The record presents no question in regard to this. The exceptions do not show the findings of the court, but we infer that the judge found, upon satisfactory evidence, an agreement of the parties after this bill was brought, that the temporary injunction should be dissolved and the defendant be permitted to dispose of the property without interference by the plaintiff, and that he should hold himself accountable for its value at the time he took it, subject to a determination by the court of the rights of the parties in regard to it. Evidently it was in reference to some such arrangement that the bond with sureties was filed by the defendant. The sale of the property by the defendant made it impossible to give the plaintiff relief in the form in which it was originally sought. But if it was arranged that the rights

and liabilities of the parties in reference to the original controversy should be determined in this suit, and it was understood that the defendant should be accountable for the value of the property as he would have been for the property itself if it had not been sold, it was proper that the plaintiff should have a decree for the payment of a sum of money that would rightly adjust their respective claims. It might well be found that the final proceedings in the suit were for the same cause, in substance and in general effect, for which the suit was brought.

Although the R. L. c. 173, § 48, relating to amendments, do not apply in terms to suits in equity, it does apply to amendments whereby an action at law is changed into a suit in equity, and it is in accordance with the general principles applicable to amendments of bills in equity. Under this statute any amendment may be allowed which "may enable the plaintiff to sustain the action for the cause for which it was intended to be brought." Whether a proposed amendment is of this class is ordinarily a question of fact for the presiding judge. The recent practice both at law and in equity, has been liberal in the allowance of amendments. See *Sanger* v. *Newton*, 134 Mass. 308; *Gray* v. *Everett*, 163 Mass. 77; *Batchelder* v. *Pierce*, 170 Mass. 260; *Adams* v. *Weeks*, 174 Mass. 45. The amendment in this case did not state the matters relied on and the nature of the relief then asked for as definitely as might have been desired, but we cannot say on this bill of exceptions that there was an error of law in the finding by the judge that the amendment might enable the plaintiff to maintain his suit for the cause for which it was brought.

Exceptions overruled.

D. M. Nickerson, Jr., for the defendant.

H. P. Harriman & H. E. Perkins, for the plaintiff.

JOHN A. RUSSELL *vs.* ARVILLA S. BRYANT.

Suffolk. March 17, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Landlord and Tenant, Assent to assignment. *Practice, Civil*, Exceptions. *Equity Jurisdiction*, Fraud. *Waiver.*

In a suit in equity founded on an alleged false and fraudulent representation of the defendant, that he would procure the consent of his lessor to an assignment of his lease to the plaintiff, a letter from the lessor to the defendant contained the following: "In regard to your selling out the lease, etc., I hardly know what to say. I think that a party who could not pay you when purchasing your furniture would hardly be a good tenant for me. I hope that you will decide to remain for a year. If you should sell out I should expect that it would be to a good, reliable party." The defendant excepted to the finding of a master that, the letter contained "no positive promise to accept even a responsible tenant." *Held*, that the finding was right; that the letter, at most, meant that the writer was considering the matter, and might consent to a transfer if the tenant was satisfactory, but was not ready to make and did not make any positive agreement to do so. *Held, also*, that a refusal by the master to find that the plaintiff was a responsible party, would not sustain an exception, as under the above interpretation of the lessor's letter it was immaterial whether the plaintiff was responsible.

In a suit in equity for the cancellation of a mortgage of furniture and carpets in a boarding and lodging house, on the ground that the mortgage was given to pay a balance due for the furniture and carpets and for the good will of the defendant, the purchase having been induced by the false and fraudulent representations of the defendant that he would procure the consent in writing of his lessor to an assignment of his lease to the plaintiff, it appeared, that the defendant failed to procure such consent, and the defendant's lessor brought an ejectment suit against the plaintiff, and that thereafter the plaintiff applied to the defendant for leave to remove the mortgaged property from the premises and the defendant consented to such removal. The mortgage contained a clause prohibiting removal of the property without the consent of the mortgagee. *Held*, that it could not be said, as matter of law, that the action of the plaintiff, in applying for the defendant's consent to the removal, constituted a ratification of the purchase or a waiver of the false and fraudulent representations. *It further appeared*, in the same suit, that the defendant was notified to take upon himself the defence of the ejectment suit but did not do so, and that the owner of the house paid the plaintiff a sum of money to secure his removal by a certain day. It did not appear that this was not before final judgment could have been obtained and execution issued, and it did not appear that there was any good defence to the ejectment suit. The defendant contended, that the plaintiff had yielded possession for a valuable consideration. *Held*, that as the plaintiff ultimately would have been obliged to vacate, he was not to be prejudiced because he made the best terms he could.

BILL IN EQUITY, filed July 1, 1901, to restrain the defendant from transferring, foreclosing or enforcing a mortgage of furniture and carpets for $562.50 given to secure that amount as the balance of the sum of $1,162.50 agreed to be paid by the plaintiff for the furniture and carpets and for the good will of the defendant at a boarding and lodging house at 23 Allston Street in Boston, alleged, as the bill is interpreted by the court, to have been purchased upon the false and fraudulent representations of the defendant, that she would assign her lease of the premises to the plaintiff with the consent in writing of Lizzie W. Burbank, the lessor, alleging that the defendant failed to procure the consent of Burbank, who took possession and ejected the plaintiff, and praying for a cancellation of the mortgage and for damages.

The letter set forth in the answer, and relied upon by the defendant, as showing that she had obtained the consent in writing of the lessor to the transfer of the lease, was as follows:

"The Nevada. New York, March 4th. Dear Mrs. Bryant, — Enclosed please find receipt for rent for March. Many thanks for the same. In regard to your selling out the lease, etc., I hardly know what to say. I think that a party who could not pay you when purchasing your furniture would hardly be a good tenant for me. I hope that you will decide to remain for a year. If you should sell out I should expect that it would be to a good, reliable party. I have reduced the rent to you and I do not retain (by the altered lease) the privilege of selling my house, if I had a good offer for it. So you see that I must have a good tenant in your place. I did not reply to Mr. Chisholm as I wanted to hear more fully from you first. Please let me know what you decide in regard to signing the leases and remaining a year. Yours sincerely, Lizzie W. Burbank."

The case was heard in the Superior Court upon a master's report and exceptions thereto. That court made a decree overruling the exceptions to the master's report, and granting the prayers of the bill, ordering, that the defendant forthwith discharge to the plaintiff the mortgage for $562.50, and surrender the mortgage note and further pay to the plaintiff the sum of $77, with costs. The defendant appealed.

S. H. Tyng, for the defendant.

J. F. Neal, for the plaintiff.

MORTON, J. This is a bill to enjoin the defendant from transferring, foreclosing or collecting a mortgage given to her by the plaintiff on certain furniture and carpets which, with the good will of a boarding and lodging house, the plaintiff was induced to purchase from the defendant, by means of certain alleged false and fraudulent representations made by her to him. There is also a prayer that the plaintiff's damages may be determined, and the defendant ordered to pay the same, and that, in default thereof, the mortgage may be cancelled and reduced by the amount so determined to be due the plaintiff.

The principal allegation in the bill, in regard to the character of the representations, describes them as false but not as fraudulent. And there is no allegation that the defendant knew them to be false. But later in the bill the representations relied on are referred to more than once as false and fraudulent, and it seems to us that the issue presented was that of a sale and purchase induced by false and fraudulent representations, and that it must have been so understood by the parties. The case was sent to a master. He does not find in terms that the representations were false or fraudulent. But he finds that the plaintiff is entitled to relief on all the evidence in the case, and that the defendant made the representations relied on and that they were material and induced the plaintiff to make the purchase. Taking the report in connection with the bill we think that the fair import of the master's findings is that the representations were found by him to be false and fraudulent.

The defendant took exceptions to the master's report. They were overruled and the master's report confirmed and a final decree entered for the plaintiff. The defendant appealed.

The first exception was to a finding by the master that a letter from the lessor to the defendant, on which the defendant relied to show that she had the written consent of the lessor to the transfer of the lease, contained "no positive promise to accept even a responsible tenant." The ground of the exception is that the master was not authorized by the rule to pass on any question of law. The interlocutory decree referring the case to a master directs that "the usual order of reference" shall issue. What that is we are not informed nor what the terms of the order in fact were. But the ruling can have done the defendant

no harm, because we think that it was plainly right. The most that can be said of the letter, it seems to us, is that the writer was considering the matter, and might consent to a transfer if the tenant was satisfactory, but was not ready to make and did not make any positive agreement to do so.

The next exception is to the refusal of the master to find that the plaintiff was a responsible party. If there was no promise on the part of the lessor to consent to an assignment of the lease, it made no difference whether the plaintiff was responsible or not. It was an immaterial matter. If it was material we do not see how it can be said that the refusal of the master to find that he was responsible was clearly erroneous.

The last exception is to the finding of the master that the plaintiff was entitled to relief, and to a discharge of the mortgage by way of damages. It is sufficient to say, we think, that we discover no error in the finding. It has been argued that the damages were excessive. But there is nothing to show that there was any error as matter of law in their assessment.

At the request of the defendant the master reported certain questions of law.

1. After the lessor had refused to accept the plaintiff as a tenant, and had brought an ejectment suit against him, and after the plaintiff had seen the letter from the lessor to the defendant on which the defendant relied to establish the written consent of the lessor to a transfer of the lease, the plaintiff applied to the defendant for leave to remove the mortgaged property from the premises where it was, and the defendant consented to such removal. The defendant contends that this action on the part of the plaintiff was a ratification of the sale and a waiver of any objection that the sale was procured by false and fraudulent representations. The mortgage contained a clause prohibiting the removal without the consent of the mortgagee. There was no claim that the mortgage was not valid. To have removed the property without the consent of the mortgagee would have been a breach of the mortgage. And the plaintiff well may have taken the course which he did for the purpose of reducing his loss as much as possible. It cannot be said as matter of law, we think, that his action constituted a ratification of the sale and a waiver of the false and fraudulent representations.

2. The defendant was notified to take upon herself the defence of the ejectment suit but did not do so. The owner of the house paid the plaintiff $100 less the costs to secure his removal by June 1. It does not appear that this was not before final judgment could have been obtained and execution issued. The defendant contends that the letter from the lessor to the defendant above referred to constituted a good defence to the ejectment suit, and that the plaintiff voluntarily yielded possession for a valuable consideration. It is not suggested that there was any other defence to the ejectment suit. The letter referred to contained no promise on the part of the lessor to transfer the lease, and therefore would not have constituted a defence either at law or in equity. The plaintiff ultimately would have been obliged to vacate, and is not to be prejudiced because he made the best terms that he could.

We think that the decree should be affirmed.

So ordered.

JAMES A. CAWLEY *vs.* EDWARD CAWLEY.

Middlesex. March 17, 1902. — May 22, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Equity Pleading and Practice, Master's report. *Partnership.*

In a suit for an accounting between partners, a motion was made to recommit a master's report to the master, directing him to make specific findings upon twelve questions concerning matters which were considered or might have been considered in making up the account. The original rule to the master, which was not appealed from, did not require such findings. The report was long and elaborate and stated very fully the considerations on which the master's decision was founded. The motion was denied by the judge. *Held*, that his discretion was exercised rightly.

In a suit for an accounting between partners, it appeared, that when the partnership was formed the defendant, a coal dealer, turned over his stock on hand without any inventory or ascertainment of its value to the partnership which thenceforth carried on the same business. The plaintiff, the defendant and several teamsters of the firm gave their estimates of the amount of coal on hand when the firm began business, which differed widely. The master, finding this evidence unsatisfactory, made calculations based on the amount of coal bought and sold by the firm from time to time, as it was shown by their books,

and the amount on hand at the close of business. There was also before the master the testimony of an expert accountant employed by the plaintiff to examine the books and exhibits. The master found the accountant's computations and estimate to be correct. *Held*, that no error appeared, and that the court could not say that the master was wrong in relying on the computations of the expert founded on the books and vouchers.

BILL IN EQUITY, filed May 23, 1890, for an accounting between partners.

In the Superior Court *Fessenden*, J. overruled the defendant's exceptions to the master's report and denied a motion of the defendant to recommit the report which is stated by the court. He found for the plaintiff and made a decree ordering the defendant to pay to the plaintiff $3,723.57 with interest from May 20, 1890, at the rate of six per cent per annum. The defendant appealed.

The judge filed the following statement: "In *Cawley* v. *Cawley* there was no evidence introduced at the hearings on the motions concerning the master's report. Nothing save the report was before the court. There were no facts found save those in the report."

N. D. Pratt, for the defendant.

F. N. Wier, (*G. F. Richardson* with him,) for the plaintiff.

KNOWLTON, J. In this case it was found that a partnership existed between the parties from January 15, 1887, to May 20, 1890, and the case was referred to a master to state the account. After the master's report came in the defendant made a motion to recommit it, which was denied, and he appealed. His exceptions to the master's report were afterwards overruled and a final decree was entered for the plaintiff in accordance with the findings of the master, and the defendant again appealed. The case is before us on these two appeals.

The motion to recommit embodied a request that the master be directed to make specific findings upon twelve questions touching matters of which some were considered and others might have been considered in making up the account. The original rule to the master, which was not appealed from and which presumably was satisfactory to the parties, did not require such findings. The report is long and elaborate, and states very fully the considerations on which the master's decision was founded. The object of the motion, as we infer, was to obtain

findings, if possible, which might strengthen the defendant's argument against the master's conclusions. We are of opinion that the discretion of the judge was rightly exercised in denying the motion. In view of the objections and suggestions of the defendant before the report was completed, the master stated at considerable length in his report the grounds on which he proceeded, and we are of opinion that there was no occasion to recommit the report for further findings.

The exceptions and the appeal from the final decree, as well as the motion which we have already considered, rest upon these two grounds: first, that because it was impossible to ascertain exactly the value of the property which was contributed to the firm by the defendant when the partnership was formed, the plaintiff could recover nothing; and secondly, that the findings of the master were on their face contradictory and erroneous.

The defendant had been a dealer in coal, wood, drain pipe, lime and cement, and the partnership afterwards carried on the same kind of business. The defendant's stock of goods was turned over to the firm without an inventory or any ascertainment of its value, and the questions in dispute relate to the findings on the subject, which were necessary in order to determine the profits of the partnership business.

There was evidence to warrant the master in finding facts sufficient to state the account. It is true that this evidence was not very satisfactory, and it left much to inference and estimate. The principal item in dispute was the amount of coal on hand when the firm commenced business. The plaintiff, defendant, and several teamsters of the firm, gave their recollection on this subject. This testimony consisted of general estimates in which the witnesses differed widely from one another. This evidence was so unsatisfactory that the master found it necessary to try to determine how much coal was bought and how much was sold by the firm while the business continued. The amount on hand at the close of business was agreed, and in this way, by calculation, the quantity which the defendant turned over to the firm in the beginning could be determined. The books of the firm, which purported to show purchases and sales, were before the master, with freight vouchers of the railroad company for weights delivered at the firm's side track, and certain checks showing

payments by the firm for coal. These books and exhibits seem to have been received and used without objection by either party. One Vinal, who died before the hearing ended, was employed by the plaintiff as an expert accountant to examine these books and exhibits, and his testimony was before the master. The master found from satisfactory evidence that the firm was practically out of coal on November 10, 1887, and in making his computations to ascertain the amount on hand in the beginning, he included only the receipts and sales down to that date, although Vinal's computations to the termination of the partnership were before him and were considered with the other evidence. The fact that the bins were practically empty at this date, the quantity on hand when they were in that condition having been found to be twenty-five tons, rendered it unnecessary to include in the computation the purchases and sales made afterwards. The master found Vinal's computation and estimate for the period between January 15, 1887, and November 10, 1887, to be correct, and so far as appears he was warranted in so finding. The evidence is not reported except that part which is embodied in the master's statement, and we cannot revise his findings unless error appears in this statement of them. We do not discover any error. The defendant's argument on this point rests chiefly on a supposed inconsistency between Vinal's computation for the period on which the finding is founded and his computation for the whole term of the partnership. But the loss of weight from shrinkage, or the possible gain from over-weight, of which there was evidence, might have been materially different in the different periods before and after November 10, 1887. We cannot say that the master was wrong in relying on Vinal's computations founded on the books and vouchers down to that date.

It is contended that the master could not state an account because it was impossible to ascertain the quantity of cement, wood, lime and sand on hand at the beginning or at the close of the partnership. The master reports that there was no evidence before him on this subject. He says, however, that it appears from an examination of the books that the firm dealt very little in either of these commodities. He accordingly states that the rights of neither party will be violated by his finding that in

the estimate of profits no account should be taken of the profits or losses arising from their dealings in these articles. We cannot say that he is wrong in this finding. As indicating that the subject is unimportant, the fact that neither party saw fit to introduce any evidence upon it is very significant. An examination of the books might well justify his conclusion.

Decree affirmed.

OLIVER DITSON COMPANY *vs.* WILLIAM H. BATES.

Suffolk. March 18, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Estoppel. Conversion.

If a wholesale dealer lets a piano upon a written lease to a retail dealer in musical instruments, who sells it without authority to one having no notice of the lease, the lessor is not estopped from asserting his title and maintaining tort against the purchaser for the conversion.

TORT for the conversion of a piano. Writ dated February 1, 1899.

The answer contained a general denial and a plea of estoppel.

At the trial in the Superior Court before *Hopkins*, J., it appeared, that the plaintiff, a corporation, was a wholesale dealer in pianos. On July 9, 1895, by a lease in writing of that date it let to J. Q. Beal and Son, retail dealers in musical instruments at Rockland, Massachusetts, a Jacobs piano at a rent of $16 per quarter, with the provision that if the piano was not returned at the end of the first quarter it was to be held at a pro rata charge for quarterly rent until notice of the ending of the contract. The defendant, having no notice of the existence of the lease, bought the piano of J. Q. Beal and Son and paid them $160 for it. Later the agent of the plaintiff informed the defendant of the lease and demanded the piano.

J. Q. Beal and Son appeared to consist of J. Q. Beal alone, who carried on business under that name. The defendant admitted that the signature to the lease, "J. Q. Beal & Son, Rockland, Music Store," was in the handwriting of J. Q. Beal, but

objected to the admission of the lease, unless shown to have been brought to the defendant's notice, because it tended to show a private arrangement between the plaintiff and Beal, its agent. The judge admitted the lease in evidence, and the defendant excepted.

At the close of the evidence, the plaintiff asked the judge to rule that there was no evidence upon which the question of estoppel set up by the defendant could go to the jury. The judge so ruled, and the defendant excepted.

The defendant asked the judge to instruct the jury as follows:

"If the jury find that the defendant made his entire arrangements for the piano with the retail dealers, J. Q. Beal & Son, and that the plaintiff shipped or delivered the piano to the defendant upon an order coming from said Beal & Son, and that the plaintiff, when it should have spoken, kept silent, and gave no notice to the defendant that the said Beal & Son were not authorized to contract with the defendant in relation to said property, and that while the plaintiff was thus silent the defendant purchased the piano from said Beal & Son, then the plaintiff is estopped from denying that the defendant acquired a good title to the piano, and the verdict should be for the defendant."

The judge refused to give this ruling, and also, to give two other rulings requested by the defendant, held by the court not to be applicable to the case.

The judge thereupon submitted the question of damages to the jury, instructing them that there was no evidence upon which the jury could find that Beal and Son were authorized to sell the piano, and no evidence which the jury could consider upon the question of estoppel set up by the defendant.

The jury returned a verdict for the plaintiff in the sum of $140; and the defendant alleged exceptions.

W. B. Grant, for the defendant.

C. L. Bremer, for the plaintiff.

MORTON, J. This is an action of tort for the conversion of a piano. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the admission of a written lease of the piano from the plaintiff to J. Q. Beal and Son from whom the defendant afterwards bought it, and to the re-

fusal of the presiding judge to give certain rulings that were asked for, and to certain instructions that were given by him.

1. The lease was clearly admissible, we think, to show the nature of the right of Beal and Son and to rebut any presumption of agency on their part.

2. The defendant contends that the question of the authority of Beal and Son to make the sale should have been left to the jury, and that the silence of the plaintiff and its delay in enforcing its rights constituted a fraud on the defendant, and estop it to assert any title to the piano. We see no ground on which either branch of the contention can stand. There was no evidence of any authority from the plaintiff to Beal and Son to sell the piano and the judge rightly so ruled and instructed the jury. They were merely lessees of the piano, and the fact that they had a retail store and kept musical instruments for sale, and that this was known to the plaintiff did not enlarge their authority or give them any right to sell the piano. *Coggill* v. *Hartford & New Haven Railroad*, 3 Gray, 545. *Sargent* v. *Metcalf*, 5 Gray, 306. *Burbank* v. *Crooker*, 7 Gray, 158. Neither was there any evidence of estoppel for the jury to consider, and on this question also the ruling of the judge was right. The plaintiff was not bound to inform the defendant of the arrangement between it and Beal and Son and it did not know and had no reason to know or believe that the defendant intended to purchase the piano of Beal and Son or that Beal and Son intended to sell it. The defendant did not know of the existence of the lease and therefore could not have been led in any way to make the purchase by the delay of the plaintiff in enforcing its rights or by its silence. The grounds of an estoppel are entirely wanting.

3. What we have said disposes of the first and second requests. In regard to the other two it is enough to say that neither was applicable to the case before the court, and both were rightly refused.

Exceptions overruled.

ELIZA W. LEONARD *vs.* ISABELLA S. LEONARD.

Norfolk. March 18, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Husband and Wife. Deed, Validity. *Fraud.*

A deed of real estate, reserving a life estate in the grantor, made by a husband principally for the purpose of depriving his wife of her statutory share in his estate, but also given in consideration of care bestowed and to be bestowed upon the grantor as long as he lives, is valid against the grantor's widow. *Brownell* v. *Briggs*, 173 Mass. 529, explained.

BILL IN EQUITY, filed November 17, 1899, and amended January 1 and May 10, 1900, by the widow of George E. Leonard, late of Foxborough, to set aside a conveyance of real estate made by her late husband to James W. Leonard, his nephew since deceased, and gifts of personal property made to the defendant then the wife and now the widow of James.

The Superior Court made a decree affirming a master's report, declaring, that the deed from George E. Leonard to James W. Leonard was given without consideration as against the plaintiff and in fraud of her rights, and was void as against her, also, that the gifts of personal property to the defendant were for the same reason fraudulent and void as against the plaintiff, and making orders accordingly. The defendant appealed.

The following facts appeared from the master's report:

The plaintiff and her late husband, George E. Leonard, were married in 1851, and lived after their marriage in Foxborough. They had no children, and he died November 4, 1894, intestate and without issue. On July 29, 1892, George E. Leonard conveyed the premises in question, of the value of $2,500, his only real estate, except a wood lot of the value of about $100, and his burial lot in the cemetery, to James W. Leonard, his nephew, the late husband of the defendant. This deed was dated July 29, 1892, and was recorded on May 21, 1894. It reserved to the grantor, "the use, occupation and control" of the granted premises during the term of his natural life. The consideration expressed in the deed was "one dollar and other valuable considerations."

The relations between the plaintiff and her husband were very pleasant up to 1880, when an estrangement arose between them that continued until his death. After 1886 her husband furnished her with no supply of food. The defendant and her husband lived on the same street with, and near, the plaintiff and her husband, and knew of the unpleasant relations between them.

The social relations between the defendant and the plaintiff's husband during the last ten years of his life were very intimate and confidential. During this time the plaintiff and the defendant were not on speaking terms and had no social relations with each other.

In July, 1892, the plaintiff's husband was seriously ill and refused to allow the plaintiff to do anything for him. He then told James W. Leonard that if he and the defendant would take care of him he would see that they were well paid, but nothing then was said about the sum to be paid, or how or when they should be paid. On July 29, 1892, without consulting with James W. Leonard, or the defendant, and without the knowledge and consent of the plaintiff, he executed the deed in question and delivered it to James W. Leonard, telling him at the same time that it was in remuneration for what they had done and were to do for him.

James W. Leonard and the defendant performed the services requested, and on April 27, 1894, the plaintiff's husband went to James W. Leonard's to live, and lived there until October 24, 1894, when he was taken to the hospital, where he died on November 4, 1894. The plaintiff's husband was seventy years old at the time of his death. He had been in failing health for several years, and after July 29, 1892, said in substance to several people that he had arranged things so that his wife would get none of his property after his decease.

In regard to a gift of $975, held by the court to be good, the defendant testified, that Merton S. Leonard was her son, that he had been obliged to have his hand amputated, and that the gift was made out of sympathy by George E. Leonard, who said, "I shall do something for Merton, for he will be handicapped all his days by the loss of that hand. I am going to give him $1,000, but I cannot give it to him because he is a minor, and I will give it to you to put in the bank for him."

In regard to the $1,000 standing in the name of the defendant, held by the court not to be sustained as a gift, the master found, that on April 2, 1888, George E. Leonard had a deposit account in the New Bedford Institution for Savings, amounting to $1,400.12, and on this date drew out $1,395.12, leaving a balance of $5 to his credit on his account. On the same date there was deposited in the defendant's name in the same institution $1,000, which had been transferred or drawn out from this account. No portion of this $1,000 account standing in the name of the defendant was drawn out during the lifetime of George E. Leonard. After his death the $1,000 account was closed by the payment of $100 on October 11, 1895, and of $1,284.08 on June 3, 1896, on orders of the defendant.

F. H. Williams, for the defendant.

J. Everett, for the plaintiff.

HOLMES, C. J. This is a bill to set aside a conveyance of land and certain gifts of personal property on the ground that they were made by the plaintiff's husband for the purpose of defrauding her of the interest that she would have taken upon his subsequent death intestate and without issue. Pub. Sts. c. 124, § 3; c. 135, § 3. The master found that the principal purpose was as alleged, the other consideration of the deed being the care bestowed and to be bestowed upon the grantor as long as he lived, and that the conveyance and gifts were void as against the plaintiff although the deed at least was made upon a consideration good against every one else. We see no reason for revising his findings except as explained hereafter, and the only question which we shall discuss is whether the facts stated warrant the conclusion of law, or in other words whether this case is within the decision of *Brownell* v. *Briggs*, 173 Mass. 529.

In the form in which *Brownell* v. *Briggs* came before the court, it necessarily was assumed that the deed there passed upon was a serious instrument operating according to its tenor except so far as the demandant's rights prevented. Therefore that decision does not stand upon the ground that the deed was understood by the parties to be an empty form got up to frighten the wife, although there was good reason to believe it, or that it was intended to be a testamentary instrument in disguise. See *Walker* v. *Walker*, 66 N. H. 390, 391, 395. By the form of the deed the

title passed to the tenant in the grantor's lifetime, so that it could not be said that the latter died seised. See *Hatcher* v. *Buford*, 60 Ark. 169, 174, 181. But it was not decided or implied, of course, that there was any right on the part of the wife that the husband should hold all land that he owned at any time during marriage until his death, or any duty on the part of the husband not to sell or to give his land away in a transaction which was not aimed at the wife. *Lightfoot* v. *Colgin*, 5 Munf. 42. *Sanborn* v. *Goodhue*, 28 N. H. 48. *Cameron* v. *Cameron*, 10 Sm. & M. 394. As a husband can convey property notwithstanding his foresight of the effect of his conveyance upon his wife, the question arises to what extent his motive can make a difference. Ordinarily, except in cases under statutes or in determining the extent of a privilege to infringe upon the admitted right of another, motive does not affect the validity of a transaction in this Commonwealth, and it does so even less in England. Cases are not in point where there is a right irrespective of the motive, such as that of creditors against conveyances manifestly defeating their power to collect their debts.

It is obvious that the decision in *Brownell* v. *Briggs* must be read with an eye to the precise facts on which it arose. That case certainly was not intended to decide that any and every otherwise valid transaction was bad into which a jury should find that there entered the motive of dislike for the grantor's wife, or even every one in which dislike for his wife predominated over love for his neighbor or desire for gain. *Wood* v. *Bodwell*, 12 Pick. 268. In *Brownell* v. *Briggs* the conveyance was a voluntary conveyance, unrecorded and left in the grantor's possession, which reserved to the grantor not only the right to use and occupy the land as he saw fit, but also the "power and authority to sell or convey the said premises in fee simple or in mortgage, and to dispose of the proceeds as I shall see fit." From the technical point of view such a conveyance does not quite take back all that it gives, but practically it does. *Welsh* v. *Woodbury*, 144 Mass. 542, 545. And the court decided that it was not enough to displace the right of the wife.

But in the case at bar no such power was reserved. The conveyance was an out and out conveyance of the fee subject to a life estate, and consideration was given for it in the support

of the grantor. Under such circumstances, apart from special statutes such as governed the decisions in *Littleton* v. *Littleton*, 1 Dev. & Bat. 327, 332, *Reynolds* v. *Vance*, 1 Heisk. 344, 345, *Jiggitts* v. *Jiggitts*, 40 Miss. 718, the great weight of authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed. *Holmes* v. *Holmes*, 3 Paige, Ch. 363. *Stewart* v. *Stewart*, 5 Conn. 317, 321. *Pringle* v. *Pringle*, 59 Penn. St. 281, 285. *Lines* v. *Lines*, 142 Penn. St. 149. *Padfield* v. *Padfield*, 78 Ill. 16, 18. *Small* v. *Small*, 56 Kans. 1, 12, 16. *Richards* v. *Richards*, 11 Humph. 429. *Smith* v. *Hines*, 10 Fla. 258, 286. *Hatcher* v. *Buford*, 60 Ark. 169, 180. *Williams* v. *Williams*, 40 Fed. Rep. 521, 522. See *Hays* v. *Henry*, 1 Md. Ch. 337, 340; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140, 147. We are of opinion that the deed must be upheld.

With regard to the personal property, the finding of the master presumably was based upon the assumption manifestly made by him that the whole case was covered by *Brownell* v. *Briggs*. We see no sufficient reason why the transfer of $975 to an account that read "Isabella S. Leonard in trust for Merton S. Leonard" should not stand. The form of the transfer corroborates the oral evidence and makes it unlikely that the gift was a mere cover and that the donor retained control of the fund. As to the $1,000 standing in the name of the defendant the case is different. No portion of this was drawn in George E. Leonard's life, and, taking into account his motive and the unsatisfactory character of the evidence in support of the gift, we think it well may have been proved that this transfer was only illusory and was not understood to be effectual between the parties.

Decree accordingly.

MARTHA L. JANVRIN *vs.* DANIEL D. POOLE & others.

Suffolk. March 19, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Way. Certiorari. Assessments, For benefits. *Revere. Words*, "Highway."

In St. 1896, c. 417, authorizing the town of Revere to elect a board of survey to have charge of the location of highways, the word "highway" includes a town way.

On a petition for a writ of certiorari against the selectmen of a town to quash the assessment of a betterment for the laying out of a way, an answer of the selectmen, stating facts which do not appear by the vote of assessment and which if true show a full compliance with the requirements of Pub. Sts. c. 51, § 1, is conclusive, and cannot be contradicted by evidence.

If on a petition for a writ of certiorari against the selectmen of a town, to quash a betterment assessment for laying out a highway, the answer of the selectmen alleges that the work of laying out and grading the way had been completed at the time of the assessment, evidence cannot be received to contradict this statement.

Under the provisions of St. 1896, c. 417, authorizing the town of Revere to elect a board of survey, a town way is not laid out until the town has voted that the way as laid out by the board of survey be accepted as a public town way, and the two years within which a betterment must be assessed under Pub. Sts. c. 51, § 1, run from the date of the vote of acceptance and not from the date of the previous order of the board of survey.

On a petition for a writ of certiorari against the selectmen of a town to quash a betterment assessment for the laying out of a highway, the petitioner cannot introduce evidence of an oral agreement of the selectmen, in awarding damages for land of the petitioner taken for the way, that betterments were not to be assessed on his remaining land, as such agreements are required to be in writing by St. 1884, c. 226. R. L. c. 50, § 11.

On a petition for a writ of certiorari against the selectmen of a town to quash a betterment assessment for the laying out of a highway, evidence of want of good faith on the part of the selectmen is not admissible.

MORTON, J. This is a petition for a writ of certiorari to quash a betterment assessed by the selectmen of the town of Revere on land of the petitioner for the laying out and construction of Waverly Avenue so called in that town. The case comes here on a report by the justice who heard it. The report concludes as follows: "If on the foregoing facts, findings, and evidence a writ of certiorari should be issued, an order is to be made accordingly; otherwise, the petition is to be dismissed, or such other order is to be made as law and justice require." The

pleadings are made a part of the report. The petition is directed against the former board of survey, the selectmen, and the inhabitants of the town. There is an answer or return by the selectmen, the inhabitants of the town, and a majority of the former board of survey. The former board of survey was abolished subsequent to the laying out of the avenue, and it is contended, amongst other things, by the respondents that a petition for certiorari cannot be maintained against the members of that board, or against the inhabitants of the town. The petitioner contends that the board of survey had jurisdiction only in regard to highways, and that, as this is a town way, the laying out was invalid and the assessment therefore void. If we assume that there is no force in the objection that a petition for certiorari will not lie against the former board of survey, or the inhabitants of the town, which we are far from intimating, (*Robbins* v. *Lexington*, 8 Cush. 292,) and that the question of the validity of the lay-out is properly raised by the petition, we think that, nevertheless, the petitioner can take nothing by her contention. It seems to us that the word "highway" as used in the act establishing the board of survey (St. 1896, c. 417) was used as including all ways which the public interest might require to be laid out, located anew, altered or widened in the town by the town authorities. Any other construction would have greatly impaired the efficiency of the act, and we can see no good reason for giving the word the limited meaning for which the petitioner contends.

The petitioner contends further that the selectmen did not comply with the provisions of Pub. Sts. c. 51, § 1, and did not determine the value of the benefit and advantage to her remaining land, nor the expense of laying out or grading the way, but voted to assess the betterment without regard to the cost of laying out and without regard to the benefit and advantage to her remaining land; that the assessment was not made within two years from the passage of the order laying out the way; and that the way was not completed before the assessment was laid. She also contends that it was competent for her to show that it was agreed between her and the selectmen that no betterments should be assessed upon her remaining land, and that evidence which she offered for that purpose and for the purpose of show-

ing that the selectmen had not acted in good faith in making the assessment, but had voted the same because it was necessary that it should be done within two years after the laying out of the way, and to offset her claim for damages, and which was rejected by the presiding justice, should have been admitted.

The whole record of the selectmen in regard to the assessment of the betterment is, so far as appears, as follows: "Dec. 17, 1900. Voted that in our opinion the estates of Mrs. Martha L. Janvrin be assessed betterment on the Waverly Avenue Extension to the amount of two thousand six hundred and twenty-five (2,625) dollars, and Mrs. E. L. Lancaster three hundred and eighty (380) dollars, a total of three thousand and five (3,005) dollars." But in their answer they say that at the time of the passage of this vote they did determine the value of the benefit, and the advantage to the petitioner's said remaining land abutting upon said way, and the expense of laying out and grading the way, and proceed to set out other things done and considered by them at that time which, if true, show a full compliance with the requirements of Pub. Sts. c. 51, § 1, provided they were done within two years of the laying out. No doubt it would have been more regular if these matters had been incorporated into the record, but the statement of the selectmen in regard to them in their answer or return is conclusive. *Ward* v. *Aldermen of Newton*, *ante*, 432. *Haven* v. *County Commissioners*, 155 Mass. 467. *Tewksbury* v. *County Commissioners*, 117 Mass. 563. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206.

The assessment was made December 17, 1900. The order of the board of survey under which the avenue was laid out was passed October 18, 1898, and it is stated in the return of the respondents that a report of the laying out was duly filed by the board of survey in the office of the town clerk on October 28, 1898. On December 19, 1898, under a proper article in the warrant, the town voted that the avenue, as laid out by the board of survey, be allowed and accepted as a public town way. The petitioner contends that the laying out took place on October 18 when the board of survey passed its order, and relies for this on *Hitchcock* v. *Aldermen of Springfield*, 121 Mass. 382. But that case arose under the city charter of Springfield, which

gives to the city council "exclusive authority and power to lay out, alter, or discontinue any street or way, the termini of which are entirely within the city." St. 1852, c. 94, § 14. The vote of the city council necessarily therefore constituted the laying out from which the two years for the assessment of the betterment began to run. The statute in the present case provided that the board should "proceed in the manner provided at the date of the passage of this act for laying out highways in said town." St. 1896, c. 417, § 6. We have already construed the word "highway" to include a town way such as this was, and in laying out town ways the final action is by the town. Pub. Sts. c. 49, § 71. It follows that the avenue in question was not laid out till the town had acted on the same December 19, 1898, and that the assessment was within two years from the laying out of the avenue.

The respondents alleged in their answer that the work of laying out and grading the way had been completed at the time of the assessment. The petitioner was permitted to introduce evidence controverting this, and the respondents to introduce evidence supporting it. The question of the competency of the evidence was reserved for the full court. The presiding justice found, if the evidence was competent, that "the street was not, on December 17, 1900, and has not been at any time, a well constructed and finished macadamized street. It was passable and safe, but its surface was rough and hard to drive over for want of a sufficient coating of screenings or gravel properly wet and rolled. The proposal for construction set out in the order of the board of survey contemplated a completed condition much better, as to the surface of the street, than that which has existed. It is a reasonable inference from the evidence, and I accordingly find, that the contractor submitted the work to the selectmen as a substantial performance of his contract, and that they accepted it as such, although it did not fully meet the requirements of the writing by which the parties were bound." The presiding justice does not seem to us to have found that the street was completed. He finds that it was passable and safe, and was accepted by the selectmen as a substantial performance by the contractor of his contract, but that is as far as his finding goes. If he had found that the street was completed, it would, perhaps,

have been unnecessary to consider the competency of the evidence. But as the case stands that question must be determined, and we are of opinion that the testimony was not competent. The object of a writ of certiorari is to bring up questions of law. See *Ward* v. *Aldermen of Newton*, *ante*, 432. It is in the nature of a writ of error addressed to inferior tribunals which do not proceed according to the course of the common law, and where, but for the remedy thus afforded, there would be no way of correcting mistakes of law. *Farmington River Water Power Co.* v. *County Commissioners*, *Tewksbury* v. *County Commissioners*, *ubi supra*. Alleged mistakes in regard to findings of fact in relation to matters within the jurisdiction of the tribunal to which the writ is addressed, or whose rulings and action are the subject of inquiry cannot be corrected any more than in any other case where the object of the procedure is to bring up questions of law. In the present case the selectmen return that the avenue was completed at the time when they made the assessment. This finding cannot be controverted by the petitioner under the present petition whatever may be the effect of it in other proceedings upon which we express no opinion. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206, 214.

In regard to the alleged arrangement by which betterment was not to be assessed upon the remaining land of the petitioner, it is enough to say that, if such an arrangement and the refusal to carry it out could be made the ground for proceedings in certiorari, it could only be in a case where the agreement was in writing as required by the statute. St. 1884, c. 226. R. L. c. 50, § 11. In this case it is not alleged that there was any written agreement.

The evidence offered in regard to the good faith of the selectmen was rightly excluded. It was only another way of retrying their decision in regard to the betterment. *Ward* v. *Aldermen of Newton*, *ante*, 432.

The result is that we think that the petition should be dismissed.

So ordered.

B. B. Dewing, for the petitioner.

S. R. Cutler, for the respondents.

PHILADELPHIA AND READING COAL AND IRON COMPANY *vs.* PAUL BUTLER & another, administrators.

Essex. March 19, 20, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Action, Survival. Abatement. Limitations, Statute of, Special. *Practice, Civil,* Amendment. *Receiver.*

Two partners were sued jointly in an action of contract for goods sold. One died, his death was suggested, and his administrator appeared to defend the suit. Three years later the administrator moved to withdraw his appearance. While this motion was pending the plaintiff was allowed to amend by discontinuing against the surviving partner. Immediately thereafter, the administrator moved that the action be dismissed. Both his motions were denied. The administrator appealed, and asked for a ruling, that the action abated against his intestate and could not be prosecuted against the estate. The ruling was refused. *Held,* that the refusal was right. Pub. Sts. c. 136, § 8, preserved the liability of the intestate's estate, and by the amendment allowed the suit begun as joint had become several. The administrator by appearing merely brought himself before the court in a matter in which the estate already was liable and thus laid the foundation for an amendment which put the case into its proper form. *Held, also,* that the fact that the discontinuance against the surviving partner was after the special statute of limitations would have run to bar the action against the administrator had he not appeared, was immaterial.

If an action for goods sold is brought in the name of a corporation when it should have been brought in the name of a receiver of its property, the defect can be cured by amendment.

HOLMES, C. J. This is an action for the price of coal alleged to have been sold to the late Benjamin F. Butler and to his partner Boynton. The case was sent to an auditor and is reported to this court by a judge of the Superior Court, with a finding that the facts are as stated by the auditor, and with an agreement for the amount of the judgment if upon the facts the plaintiff is entitled to recover. Two questions only are argued by the defendants: whether the action can be maintained against the present defendants, and whether the contract declared on is made out.

The suit was begun against Butler and Boynton. On March 11, 1893, the death of Butler was suggested, and on August 8, 1894, instead of treating their testator's estate as discharged by his death from the suit upon the joint contract, his adminis-

trators appeared to defend the action. The case hung along, although some steps were taken in it, for over three years, when, on December 16, 1897, the administrators moved for leave to withdraw their appearance, as entered inadvertently and without authority of law. On June 2, 1898, while this motion was pending, the plaintiff moved to amend by discontinuing against Boynton. This the plaintiff was allowed to do on June 4. Five minutes later on the same day the administrators moved that the action be dismissed. Both the motions of the administrators were disallowed on July 18, 1898. The administrators appealed, and also asked a ruling at the hearing in the Superior Court that the action abated as against Butler by his death and cannot be prosecuted against his personal representatives, in spite of their appearance, the discontinuance against Boynton and Pub. Sts. c. 136, § 8.

We are of opinion that the ruling asked was wrong. The argument for it is that although the statute cited preserved the liability of General Butler's estate "as if the contract had been joint and several," it did not preserve the liability to a joint suit. But this argument tacitly assumes that the essence of the present cause of action is liability to a joint suit, which is a mistake. The essence is liability under the contract, with all its incidents. A suit begun as joint may become several by death. There is no reason why it should not become so also by amendment if the amendment is allowed. There is no reason why a suit begun on a contract as several should not be amended into a suit upon it as joint. And if persons are joined who all are liable upon it, and where the only objection to the joinder is the difference in the form of the proper judgments against them respectively, *Colt* v. *Learned*, 133 Mass. 409, 411, there is no reason against allowing an amendment so that only one of them shall be sued.

The administrators by appearing did not attempt to impose upon the estate a liability which did not exist, as in *Mellen* v. *Baldwin*, 4 Mass. 480. They merely brought themselves before the court in respect of a matter for which they were liable and thus laid the foundation for an amendment which put the suit into its proper form.

Ricker v. *Gerrish*, 124 Mass. 367, is relied on by the defend-

ants but it does not help them. There one of the defendants died and the plaintiff afterwards discontinued as to the other and then tried to summon in the representative of the deceased. The latter appeared specially and moved to dismiss, which was done. Obviously the representative could not be summoned in at that stage any more than if the attempt had been made before the discontinuance. The law in the latter case had been declared by *New Haven & Northampton Co.* v. *Hayden*, 119 Mass. 361, and the principle of that case was applied, because the right to summon in the representative against her will could exist only if the action had been amended into an action against the deceased severally, and such an amendment was not accomplished merely by discontinuing against the other defendant after the deceased had dropped out of the case.

The fact that the discontinuance against Boynton was after the special statute of limitations would have run in favor of Butler's administrators but for their appearance is immaterial. See *Costelo* v. *Crowell*, 134 Mass. 280; *East Tennessee Land Co.* v. *Leeson*, 178 Mass. 206.

The other objection is that the contract declared on is not made out. The only ground pressed by the defendant is that the sale was made by receivers while the plaintiff's property was in their hands. If other objections had been urged, it might have been necessary to discharge the report as not sufficiently finding the facts, and possibly it may be necessary with regard to this one. But we hardly should expect the point to be pressed, seeing that if it were sound the defect could be cured by an amendment. *Hayward* v. *Leeson*, 176 Mass. 310, 326.

We express no opinion as to whether the objection is well founded. If the defendants deem it desirable to raise further question as to the right of the plaintiff to maintain the suit, the report will be recommitted for a fuller statement of the relation of the plaintiff to the contract, or an amendment may be made. Otherwise judgment will be entered for the plaintiff according to the agreement.

Ordered accordingly.

L. S. Dabney, (*F. L. Washburn* with him,) for the defendants.

R. M. Morse, (*W. M. Richardson & J. C. M. Bayley* with him,) for the plaintiff.

SARAH J. SPENCER *vs.* JOHN SPENCER.

Suffolk. March 20, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Contract, Implied.

In an action for personal services by an unmarried woman against her brother, it appeared, that for a time she lived with him as his housekeeper for pay, and that he then fell ill and she kept on for many years, receiving no pay, but on the contrary earning money outside which she used for the support of the defendant and his children. *Held*, that whether the defendant expected to pay for the services or not was immaterial, and that it was not necessary, in order to bind him, that he should have believed that the plaintiff expected pay, if when he accepted the services he should have understood from what he knew that such was the expectation.

CONTRACT for work done by the plaintiff for the defendant for twelve years from August, 1888, to August, 1900, at $2 per week. Writ dated February 26, 1901.

At the trial in the Superior Court before *Hopkins*, J., it appeared, that the plaintiff was an unmarried woman and a sister of the defendant, who was a wool sorter by trade. The plaintiff offered evidence tending to show, that the defendant's wife died in 1885, leaving him with four children, the oldest being then ten years of age; that the defendant requested the plaintiff to come and live with him, to keep his house and take care of his children, and agreed to pay her therefor $2 per week; that she went as requested and worked for him and he paid her in full at the promised rate for two and one half years, until in 1888 an illness incapacitated him for further labor at his trade; that she continued to live in his house and work for him until she left, in August, 1900, and that no further payments were made to her except one of $5, in December, 1900; that after the illness of the defendant she went out to work, sometimes two, sometimes three, and sometimes four days a week, and that she used the money so earned for the support of the defendant and his children; that on the days when she went out to work, she did the work of the defendant's household before and after returning from work outside.

There was evidence offered by the defendant tending to show, that after the death of his wife, in 1885, his sister, the plaintiff, said she wanted a home and did not want his children to have a stepmother; that he engaged her as she testified, and paid her in full up to the time he was taken sick with hemorrhages from the lungs, which incapacitated him for work at his trade; that he had no income from which to pay the plaintiff after he ceased to work at his trade, except the rent of his houses, and that she knew of that fact; that he never paid her anything after that and that he did not pay her $5 in December, 1900; that several years after he was taken sick the plaintiff was angry with him and he sent his son with $8 to her which she refused to take; that from the time of his sickness to the time she left his house in August, 1900, she never asked or demanded of him any sum of money for her work; that during all that time she occupied exclusively and kept the key of a room in his house; that during all that time she went out at her pleasure to work for others, sometimes during the spring and fall, the whole week at a time, at other times of the year not so often, but doing all the work she could get, sometimes three, four or five days in the week, going after breakfast in the early morning and returning according to where she was working, sometimes at eight o'clock at night; that he had nothing to do about this work or her earnings; that after his sickness, in 1888, he was about the house and able, with the assistance of his children, to do all that was necessary to be done, and that his sister, the plaintiff, did only that which she saw fit to do.

The judge ruled that the plaintiff could not recover for any services rendered more than six years before the date of the writ, and among other instructions, to which no exception was taken, instructed the jury that, in an action for services rendered the plaintiff could not recover unless the jury found that the person rendering the services expected to be paid for them, and believed that the person receiving them knew that payment was expected for them, and also, that the person receiving the services expected to pay for them and believed that the person rendering the services expected to have pay for them.

The jury found for the defendant; and the plaintiff alleged exceptions.

J. H. Vahey, C. H. Innes & J. B. Ferber, for the plaintiff.

J. F. McDonald & D. B. Ruggles, for the defendant.

HOLMES, C. J. This is an action for personal services brought against the defendant by his sister, an unmarried woman. For a time she lived with him as his housekeeper for pay. Then he fell ill and she kept on for twelve years, receiving no pay, or at most, $5, which was disputed, but on the contrary working out and using the money she earned for the support of the defendant and his children. The judge instructed the jury in substance that the plaintiff could not recover unless she had expected to be paid for her services and had believed that the defendant knew that payment was expected for them, and unless the defendant had expected to pay for them and had believed that the plaintiff expected to have pay for them. The plaintiff excepted, and brings the case here after a verdict for the defendant.

We have felt some doubt whether these instructions should be construed to mean anything more than that the parties must have understood that they were dealing on a business footing, in which case we should hesitate to sustain the exceptions merely because of a theoretical leak to which no attention was called. Even so construed the proposition would be inaccurate since it would be enough to make a contract if the defendant as a reasonable man ought to have understood that the services were rendered for pay and not merely for love. But we are of opinion that the language of the judge went further than we have suggested, and too far for us to save it, however proper the verdict may seem to have been. Of course it does not matter whether the defendant expected to pay for the services or not, the question is as to the natural import of his overt acts. *Bohn Manuf. Co.* v. *Sawyer*, 169 Mass. 477. *Hobbs* v. *Massasoit Whip Co.* 158 Mass. 194, 197. Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what he knew that such was the expectation, he would be bound by accepting the services. *Day* v. *Caton*, 119 Mass. 513. It is unnecessary to criticise the ruling further.

Exceptions sustained.

HENRY F. LANGLEY *vs.* AUSTIN A. WHEELOCK & others.

Middlesex. March 20, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employer's liability, assumption of risk.

A porter employed in a storeroom where steel bars are stored by leaning them against the walls between racks formed by a wooden pin on each side, takes the risk of an injury caused by one of the bars falling after it has been in the same place for a month.

In an action by a porter employed in a storeroom where steel bars were stored by leaning them against the walls between racks formed by a wooden pin on each side, for an injury caused by one of the bars falling after it had been in the same place for a month, it appeared, that this bar and another both four inches in diameter were placed by direction of a superintendent between two pins where there was not room for both of them to rest against the wall and one stood against the other in such a way that more than half of the outer one projected beyond the ends of the pins. *Semble*, that this might not be evidence of negligence.

TORT by a porter and shipper employed in the storeroom of the defendants for injuries caused by the fall of a steel bar through the alleged negligence of one Stimpson a superintendent of the defendants. Writ dated August 4, 1900.

In the Superior Court *Sherman*, J. ordered a verdict for the defendants; and the plaintiff alleged exceptions.

G. P. Beckford, for the plaintiff.

J. P. Tucker, (*D. L. Smith* with him,) for the defendants.

MORTON, J. This is an action of tort for personal injuries received by the plaintiff while in the employ of the defendants in their store in Boston. At the conclusion of the plaintiff's evidence, the judge directed a verdict for the defendants, and the case is here on the plaintiff's exception to that ruling.

The defendants are in the steel and iron business, and keep in their store large quantities of steel, the greater part of which is in bars of different lengths varying in diameter from an eighth of an inch to eight inches. Around the store are racks in which the steel is kept. The racks are about four feet from the floor, and are made by putting pins through planks which run round the sides of the store. Some of the pins are made of wood and

some of iron. The bars stand on the floor leaning against the walls in these racks. The plaintiff was injured by the falling of a bar of steel, about nine and a half feet long and four inches in diameter and weighing about four hundred and twenty pounds, which stood in one of these racks with another bar of similar size and weight leaning against the wall. The pins to this rack were of oak and about an inch in diameter, and were five and three sixteenths inches apart. They were four feet five inches from the floor, and from the wall to the outer ends of them, it was thirteen and three sixteenths and fourteen and five sixteenths inches respectively. The inner bar leaned against the wall and from the wall to its outside base was fifteen and one quarter inches. The top of the outer bar rested against the inner one and from the wall to the outside of its base was twenty-two and a quarter inches. These bars had stood in the same place and position for about a month. Before that they had lain on the floor. There was evidence which perhaps would justify a finding that they were placed in the rack by the direction of a Mr. Stimpson, the manager of the defendant's store. The plaintiff had worked in the store as porter and shipper for about two years before the accident, and was entirely familiar with the stock and with the way in which it was handled and kept. He testified that this rack had not been used for four inch bars before these were placed there. On further examination he said that bars of the same diameter had been placed there before but that they were shorter. He also testified that "there was not room between the two pins in question for more than one of the large four inch bars, not to be safe, and when there were two bars put in this rack one half of the outer bar would be beyond the ends of the pegs." It appeared that he had occasionally marked tags at a desk that stood within a few feet of these bars, and that he might have glanced at them but had noticed nothing especial about them.

It is plain that the way in which the defendants kept their stock was by standing up the bars against the walls around the store in the racks which have been described. The plaintiff understood this and does not contend that it was negligence on the part of the defendants to conduct their business in that way. If it was, he clearly assumed the risk of it. What he contends,

however, is, in effect, that considering the size of the rack and of the bars, it was negligent to stand them up in it as was done. But here again standing these bars up against the wall in this rack was so much a part of the ordinary business of the store and was so much to be expected, that it seems to us that the plaintiff must be held to have assumed the risk of it. Furthermore, there is nothing to show what caused the bar to fall. It had stood there securely for a month. There is no evidence that when it was placed there originally due care was not used in standing it up against the other bar so that it should not fall. And taking into account the nature of the business and the way in which it was done, we doubt whether it could be fairly said that the defendants or their manager were negligent as against the plaintiff merely because they stood one bar up against another in such a manner that half or more than half of the outer one was beyond the ends of the pins that constituted the rack that held them. See *Carter* v. *Boston & Albany Railroad*, 177 Mass. 228.

The result is that we think that the exceptions should be overruled.

So ordered.

ELIZABETH S. BARRETT *vs.* CHARLES A. KING & another.

Suffolk. March 20, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Corporation, By-laws, Stockholders. *Conversion.*

In an action against a corporation for an alleged conversion of the plaintiff's shares of stock therein by refusing to issue a certificate to the plaintiff, it appeared, that the following was a by-law of the corporation, which was printed upon its certificates of stock: "No stockholder shall sell or otherwise dispose of the whole or any part of his stock unless he shall, at least thirty days previous thereto, have offered in writing to sell the same to the board of directors upon the same terms and for the same price as he shall have been offered by his prospective purchaser, and such offer to said directors shall not have been accepted within that period." The shares in question had been transferred to the plaintiff by a stockholder without first offering them to the directors or otherwise complying with the by-law. *Held*, that the by-law was lawful, at least between the plaintiff and the corporation, and prevented the defendant's refusal to transfer the shares from being a conversion, if otherwise it would have

been. *Whether*, if trover can be extended to such a case, any one but the legal owner could be regarded as having the necessary present right of possession, *quære*.

TORT for the alleged conversion of twenty shares of the capital stock of the Continental Brewing Company against Charles A. King and that corporation. Writ dated July 3, 1899.

In the Superior Court *Hopkins*, J. ordered a verdict for the defendants; and the plaintiff alleged exceptions.

The face of the certificate for the shares in question contained the following: "This Certifies that William A. Holmes, of Boston, Mass., is the owner of twenty (20) Shares of the capital stock of the Continental Brewing Company, and said shares are transferable only in person, or by attorney duly constituted, on the books of the Company on the surrender of this certificate, duly executed, and are only transferable in accordance with the By-Laws of the Company which are hereon indorsed, and with such other By-Laws rules and regulations as the stockholders shall for such purpose ordain and publish."

On the back of the certificate were the following extracts from by-laws:

"Section 2. No transfer of any stock of this Corporation shall be of any effect as concerns the Corporation until the certificate therefor has been duly executed and surrendered for cancellation, and the transfer has been registered upon the books of the Company."

"Section 4. No stockholder shall sell or otherwise dispose of the whole or any part of his stock unless he shall, at least thirty days previous thereto, have offered in writing to sell the same to the Board of Directors upon the same terms and for the same price as he shall have been offered by his prospective purchaser, and such offer to said directors shall not have been accepted within that period.

"In case any stock so offered under this provision of this By-Law is accepted by the Board of Directors, said Board may sell said stock, either in whole or in part, for a price not less than the market value of said stock, to any stockholder, or to any persons engaged in the business of bottling or of vending beer or ale or other malt beverage, or dealing in malt or malt extracts. If said offer to said directors shall not have been accepted within

said period of thirty days, no sale by said stockholder at a less price than the price mentioned in his said offer to the directors shall be valid, and no transfer shall in such case be made by the Company."

S. L. Whipple & E. V. Grabill, for the plaintiff.

E. K. Arnold, for the defendants.

HOLMES, C. J. This is an action of tort for the conversion of twenty shares of stock in the Continental Brewing Company, by a refusal to transfer it to the plaintiff on the books of the company. It may be assumed for the purposes of decision that the stock was purchased on the plaintiff's behalf, but it stood in the name of one W. A. Holmes, who indorsed the certificate and handed it over to the plaintiff as soon as he got it. This certificate was expressed to be transferable only in accordance with the by-laws of the company printed upon it, and one of those by-laws forbade a disposition of the stock unless the stockholders, at least thirty days previous thereto, should have offered in writing to sell the same to the board of directors upon the same terms and the offer had not been accepted. There was no evidence that Holmes had made such an offer and the judge of the Superior Court ordered a verdict for the defendant, subject to the plaintiff's exception. If this course was right it is unnecessary to consider the various minor questions that were raised while the plaintiff's case was going in.

It is argued that the plaintiff is not within the by-law because she was an undisclosed principal and should be regarded as having had the legal title from the moment of the purchase with her money. But we might as well talk about an undisclosed principal in a deed of land. The corporation has nothing to do with undisclosed equities or undisclosed relations. The only person whom it can recognize as owner is the one who appears as such upon its books. *J. H. Wentworth Co.* v. *French*, 176 Mass. 442. And if, after it has issued a certificate, some one else claims rights in the stock, it is entitled to require that person, before disturbing it, to establish his right in accordance with the lawful conditions which the certificate expresses. We may observe that in the plaintiff's argument she is called an original subscriber, but that this would be inaccurate even if the argument were better than it seems to us. Holmes purchased of

the defendant King. We do not perceive, however, that this fact is material on either side.

But it is said that if the plaintiff has to claim by virtue of Holmes's indorsement, then she has a legal title to the stock by transfer. For it is said that the by-laws do not purport to make invalid a transfer without a previous offer to the directors, and that if they do they are against public policy and void. As to the meaning of the by-laws we shall not spend argument. They certainly did not mean to leave the company and the directors liable to an action for refusing to carry out what they prohibit. As to public policy, we see nothing in the provision contrary to that, at least as between the plaintiff and the corporation. The law of West Virginia, under which the defendant corporation was organized, is not before us. Under the law of Massachusetts, the stipulations, considered as a contract between the corporation and Holmes, undoubtedly would be lawful. *New England Trust Co.* v. *Abbott*, 162 Mass. 148. And this decision goes far to sustain the by-law as such, by consequence. See *Feckheimer* v. *National Exchange Bank of Norfolk*, 79 Va. 80, 83. Furthermore, looking at the stock merely as property, it might be said that, so far as appears and probably in fact, it was called into existence with this restriction inherent in it, by the consent of all concerned. See *Braintree Water Supply Co.* v. *Braintree*, 146 Mass. 482, 488. This is not the case of a by-law attempting to cut down rights of property already acquired, against the will of some of the owners. The whole stock originally was issued to the defendant King in payment for the plant and he was desirous of keeping it in the hands of consumers, that is of liquor dealers. And this suggests a further consideration. Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership. Notwithstanding decisions under statutes, like *In re Klaus*, 67 Wis. 401, there seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm. In *Price* v. *Minot*, 107 Mass. 49, 60, no doubt was thrown on the validity of a by-law much more questionable than this.

We perceive no difficulty in the case except the somewhat academic question whether the by-law accepted by Holmes when he accepted the certificate operates only by way of contract and

should be pleaded as such, or whether it affects the character of the property itself as we have suggested. In our opinion it at least so far affects the character of the act relied upon as a conversion as to prevent its being a wrong. Therefore it is unnecessary to analyze the matter more nicely or to inquire whether, apart from the by-law and more general difficulties, Lowell, Transfer of Stock, §§ 11, 238, the plaintiff had such a legal title as to warrant an action of trover. It is settled that an assignee of a certificate of stock has a standing in a court of law to maintain assumpsit, *Sargent* v. *Franklin Ins. Co.* 8 Pick. 90, *Sargent* v. *Essex Marine Railway*, 9 Pick. 201, or an action on the case, *Hussey* v. *Manufacturers' & Mechanics' Bank*, 10 Pick. 415; and in *Bond* v. *Mount Hope Iron Co.* 99 Mass. 505, an action was maintained counting in trover and assumpsit but without consideration as to which was the proper form. As against the corporation the plaintiff would not be the legal owner even if she had a present right to become so. This action is for a conversion of the stock, not of the certificate. If trover can be extended to such a case, it would seem open to question whether any one but the legal owner could be regarded as having the necessary present right of possession. But this suggestion need not trouble us here.

Exceptions overruled.

MICHAEL ROCHE *vs.* LOWELL BLEACHERY.

Middlesex. March 20, 21, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Employers' liability act, exercising superintendence.

In an action under the employers' liability act for injuries caused by the alleged negligence of the defendant's superintendent while exercising superintendence, it appeared, that the plaintiff operated a washing machine in the defendant's bleachery, and that while he had stopped his machine and had gone out of sight on a floor above in order to tighten certain cylinders which dragged the cloth along as it came from his machine, the superintendent came by and negligently with his own hand started the machine, causing the plaintiff's injuries. *Held*, that starting the machine was an act of superintendence.

TORT by a workman in the defendant's bleachery for injuries received while tightening certain cylinders called binders connected with a washing machine operated by the plaintiff, by reason of the negligence of one Royer, the defendant's superintendent, in starting the plaintiff's machine. Writ dated June 18, 1900.

In the Superior Court before *Hardy*, J., the defendant requested the judge to rule, that there was no act of Royer as superintendent which caused the injury or contributed to it, and that the act of Royer in starting the machine was the act of a fellow servant and not an act of superintendence under the statute.

The judge refused to give these and other rulings requested by the defendant. The jury returned a verdict for the plaintiff in the sum of $4,000; and the defendant alleged exceptions.

G. F. Richardson, (*F. N. Wier* with him,) for the defendant.

C. W. Bartlett & E. R. Anderson, (*J. P. Feeney* with them,) for the plaintiff.

HOLMES, C. J. This is an action of tort under the employers' liability act, now R. L. c. 106, § 71, cl. 2, to recover for personal injuries alleged to have been caused to the plaintiff, an employee, by the negligence of a superintendent, one Royer. It is not disputed that the plaintiff was using due care, or that the act which caused the injury was done by a person whose sole or principal duty was that of superintendence, or that there was evidence that it was negligent; the only question argued on the exceptions is whether there was any evidence that that specific act was an act of superintendence.

The plaintiff ran a washing machine for the defendant. In connection with this machine were certain cylinders called binders, which revolved and dragged the cloth along as it came through the plaintiff's machine. These binders frequently became loose, and it was the plaintiff's duty to tighten them. In order to do so he had to stop his machine and go up to another floor out of sight of the machine. At the time of the accident the binders had become loose and the plaintiff was tightening them in this way, having first stopped his machine, when the superintendent came along and set the machine running, by reason of which the plaintiff was caught in the shafting above.

It is well understood that an employer is not liable for every act done by a person engaged in superintendence, even if done to help in carrying out an order which the latter himself has given, and that different minds may differ as to where the line shall be drawn. *Joseph* v. *George C. Whitney Co.* 177 Mass. 176, 177. But we are of opinion that the jury was warranted in finding if not bound to find for the plaintiff in this case if it found the facts to be as the plaintiff contended. The negligence, if there was any, did not consist in the mechanical details of carrying out a proper order; it consisted in setting the machine in motion at that time. If the superintendent had told another workman to start it up, probably the case would not be here. It is true, perhaps, that that could not be accepted as a universal test, because often the negligence is due to the consciousness of the party not having been directed to the point of complaint, which the hypothesis of a direction assumes it to have been. But the test seems to be of use when, as here, the precise object of the superintendent's conception was improper. In such a case the proximity between the brain that conceived and the subordinate ganglion that carried out the thought seems not to be a ground of exoneration. See *O'Brien* v. *Look*, 171 Mass. 36. Supposing the order to have been given, it would have been of sufficient importance and would have risen enough above merely mechanical execution of the work that might have come from any workman to be matter of superintendence. Indeed one might say shortly that except as superintendent Royer had no business to meddle with the machine.

Exceptions overruled.

MELINA FRENCH *vs.* HELEN S. F. FOLSOM.

Suffolk. March 21, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Incumbrance. Boston. Way.

Under St. 1891, c. 323, providing for a board of survey in the city of Boston, and acts in amendment thereof, no incumbrance is created on land over which it is proposed to lay out a street until a plan is filed under the provisions of that act.

CONTRACT for $500 paid by the plaintiff under an agreement in writing by which the defendant agreed to convey certain land to the plaintiff "by a good and sufficient deed." Writ dated May 21, 1897.

In the Superior Court *Sherman*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. C. Wait, for the plaintiff.

J. Duff, for the defendant.

MORTON, J. This is an action for breach of contract to recover a deposit paid by the plaintiff to the defendant in part performance of a written agreement entered into between the parties for the purchase and conveyance of certain premises described therein. The defendant agreed "to execute and deliver a good and sufficient deed conveying said property on or before the 15th day of April, A. D. 1897." The time was afterwards extended by mutual agreement to May 15. The premises were described by metes and bounds and then followed these words, "Being the same premises conveyed to me [the defendant] by George T. Hawley by deed dated March 27, A. D. 1876, subject to the restrictions mentioned in the deed of said Hawley respecting the maintenance of a sidewalk." The defendant tendered a warranty deed subject to the restriction mentioned in the deed from Hawley which the plaintiff refused to accept, and, after a demand for the return of the deposit, brought this action. The judge ruled upon the plaintiff's opening offer of proof that the action could not be maintained and ordered a verdict for the defendant. The case is here upon the plaintiff's exceptions to this ruling.

We think that the ruling was right. The plaintiff's contention is that the St. of 1891, c. 323, and the acts in amendment thereof, and a preliminary hearing which the board of survey gave in 1894 under that statute with reference to the section of the city in which the land in question lies and a plan in the office of the city surveyor on which was marked, in pencil, lines indicating a way forty feet wide along the southerly side of the premises which the plaintiff was informed through her agent by members of the board of street commissioners, which had succeeded the board of survey, indicated their intention with reference to laying out ways in said premises, constituted an incumbrance on the land. The plaintiff offered to show that she did not know of the statute or of these facts till after the execution of the agreement, and that, prior to the execution of the agreement, a plan of the premises was exhibited by the defendant's agents to her agent on which was shown a method of cutting up the premises into lots on both sides of a proposed way that rendered the land much more valuable than it would otherwise be; that it was represented by the defendant's agents that the land could be so divided, and that she executed the contract relying upon the fact that such subdivision could be made and that this was known to the defendant's agents. She also offered to show that she endeavored, but without success, to secure the assent of the street commissioners to the way shown on this plan, and that in July, 1897, a second hearing was given by the street commissioners on a plan showing the forty foot street above referred to, and that in January, 1902, a plan was filed by them dealing in part with these premises but not, as we infer, adopting the way shown on the plan that had been exhibited by the defendant's agents.

We assume that the defendant was bound to convey the land free from all incumbrances except the restriction in regard to the maintenance of a sidewalk. *Linton* v. *Allen*, 147 Mass. 231. We doubt whether the reference in the contract to the premises as "being the same premises conveyed to me by George T. Hawley by deed dated March 27, A. D. 1876" is to be regarded as anything more than a part of the description, and whether it can be construed as binding the defendant to convey, as the plaintiff contends, the same premises, that is, the same title in

all respects that Hawley conveyed. But, however that may be, we are of opinion that the St. of 1891, c. 323, and the acts in amendment thereof, and the preliminary hearing, and the map in the surveyor's office with the pencil lines on it and the refusal of the commissioners to assent to the way on the defendant's plan did not constitute an incumbrance on the premises in question. The statute of itself did not constitute an incumbrance any more than the highway acts of which it is a part did. And it is not, we think, until a plan has been filed in accordance with the statute that anything in the nature of an incumbrance under it can be said to exist. *Daniell* v. *Shaw*, 166 Mass. 582. That did not occur in the present case till a long time after the bringing of this suit and after the time for performance had expired. It is not necessary to decide whether the defendant could have maintained a bill in equity for specific performance. Even if she could not, she still might have been able to maintain an action at law upon the contract to recover damages for its breach upon the plaintiff's refusal to accept the deed. *Whittemore* v. *New York, New Haven, & Hartford Railroad*, 174 Mass. 363.

The representation that the premises could be subdivided as shown upon the plan has not been relied upon. Manifestly it did not refer and was not intended to refer to the action of the street commissioners, but to the physical capabilities of the tract.

Exceptions overruled.

HAROLD C. FRENCH *vs.* DONALD E. McKAY.

Suffolk. March 24, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Agency, Broker.

If the conduct of a broker employed by one of the parties was the efficient cause which brought about an exchange of real estate, he can recover his commission although the parties concluded the exchange without him.

CONTRACT by a real estate broker to recover a commission. Writ dated July 16, 1900.

At the trial in the Superior Court before *Stevens*, J., the jury returned a verdict for the plaintiff in the sum of $218.94; and the defendant alleged exceptions.

A. M. Lyman, for the defendant.

W. B. Grant, for the plaintiff.

HOLMES, C. J. This is an action by a broker to recover commissions upon an exchange of real estate. The exchange consisted of a conveyance by the defendant of a house in Waltham to the wife of one Merrifield, and conveyances to the defendant of houses in Melrose, Dorchester and Brighton belonging to Merrifield's wife. The defendant employed the plaintiff and the plaintiff called Merrifield's attention to the Waltham house and introduced him to the defendant. Suggestions for an exchange of this house were made, and at the last interview at the plaintiff's office, Merrifield said that he and his wife, for whom, as he testified, he was acting as agent, would go to Waltham and further examine the property. This was on or about the last day of May, 1900, and the conveyance was made on June 8. The defendant, by his exceptions, seeks to escape liability because the contract was made behind the plaintiff's back, and what he received was not the same property which was under consideration when the plaintiff last was seen in the business. It is plain that neither of these facts necessarily bars a recovery by the plaintiff, otherwise brokers always might be cheated out of their commissions. *Dowling* v. *Morrill*, 165 Mass. 491. *Whitcomb* v. *Bacon*, 170 Mass. 479. No more need be said to justify the refusal of the rulings requested by the plaintiff.

An instruction was given that if the plaintiff brought the parties together and then if by negotiations between the parties themselves afterwards they effected an exchange, it would be enough to entitle the plaintiff to his commission if he stood ready to do anything needed to effect the exchange in addition thereafter. Whether or not this proposition standing by itself might be too broad, *Whitcomb* v. *Bacon*, *supra*, *Cadigan* v. *Crabtree*, 179 Mass. 474, it was qualified by the later statement that the plaintiff was not entitled to recover simply because he brought the parties together, unless his conduct was the efficient cause which produced the result. The instructions were sufficiently favorable to the defendant.

Exceptions overruled.

ARTHUR S. LELAND & another *vs.* VIRGINIA L. CONVERSE.

Suffolk. March 24, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Exceptions. *Evidence*, Materiality, Conversations between husband and wife.

The exclusion of a question is no ground for exception if there is nothing to show what the answer would have been, or if the testimony which it was intended to bring out was in fact brought out by the next question.

In an action by brokers against a married woman for a balance alleged to be due on account of the purchase and sale by them for her of certain stocks, where the defence is that the transactions were those not of the defendant but of her husband, the defendant cannot be asked whether the purchase of any of the stocks was in accordance with her wishes, since her intention is not in issue and therefore her undisclosed wishes are immaterial.

In an action by brokers against a married woman for a balance alleged to be due on account of the purchase and sale by them for her of certain stocks, the defence was that the transactions were those not of the defendant but of her husband. The defendant was allowed to introduce evidence that she had authorized no one other than her husband to purchase stocks for her. She then wished to show, that, while she had had conversations with her husband in regard to the stocks, she had not authorized him to purchase them for her, and that he was not her agent. There was no offer to show that any third person was present at any conversation between her and her husband. The evidence was excluded. *Held*, that the exclusion was right. The effect of allowing the evidence would have been to enable the defendant to give either her construction of or the result of conversations between her and her husband, inadmissible under Pub. Sts. c. 169, § 18, cl. 1. R. L. c. 175, § 20, cl. 1.

CONTRACT for a balance of $11,711.74 alleged to be due on account of the purchase and sale of certain stocks by the plaintiffs for the account of the defendant. Writ dated February 5, 1894.

At the trial in the Superior Court before *Richardson*, J., the jury returned a verdict for the plaintiffs in the sum of $13,417.83; and the defendant alleged exceptions.

O. O. Partridge, for the defendant.

R. M. Morse, for the plaintiffs.

MORTON, J. This is an action of contract to recover of the defendant a balance alleged to be due the plaintiffs on account of the purchase and sale by them, as brokers, for her, of certain

stocks. There was a verdict for the plaintiffs, and the case is here upon exceptions by the defendant to the exclusion of certain evidence that was offered by her, and to a ruling by the presiding judge that the wagering contracts act (St. 1890, c. 437,) did not apply to the action, and to his refusal to give an instruction asked for by the defendant based upon the applicability of that statute to the case at bar. The last two exceptions have been waived and the exceptions insisted upon relate solely to the matters of evidence.

The defence was that the transactions were between the plaintiffs and the defendant's husband, and that certain bonds belonging to the defendant, which were given to the plaintiffs as collateral security, were lent by her to her husband. The first exception was to the exclusion of a question to the defendant as to what she did as the result of a conversation with her husband after one of the plaintiffs had been to their home. It does not appear what the answer would have been, and for that reason, if for no other, the exception must be overruled. It is possible, moreover, that the testimony which it was intended to bring out was brought out in the answer to the following question; and if so no harm could possibly have been done by the exclusion of the question. Another exception related to the exclusion of a question to the defendant whether the purchase of any of the stocks was in accordance with her wishes. The intention of the defendant was not an issue in the case and her undisclosed wishes were therefore incompetent and immaterial. *Tallant* v. *Stedman*, 176 Mass. 460, 466. This exception also must be overruled. The remaining exceptions relate to whether the defendant authorized any person to buy stock for her and to questions as to her purpose in delivering the bonds to her husband. Even if it be assumed that some of the questions were competent, which we do not intimate, it is difficult to see how the defendant could have been harmed by their exclusion. The utmost that can be said is that if admitted they might have made a little plainer what was already apparent from her testimony and that of her husband, that they denied that she had purchased or authorized the purchase of any of the stocks, and took the position that the transactions were between the plaintiffs and her husband. She was permitted to testify, and did testify, without

objection, "that she did not consider it was her business" that "she supposed it was his [her husband's] business," and that "she had no interest in the account except such as a wife would naturally have in the business of her husband." The husband testified amongst other things that "he personally ordered for himself, and not for his wife, all the stocks which were purchased and the sale of all which were sold," and that he told the member of the firm with whom the transactions were had that "he had no money or securities to put up as margin, but if he purchased the stocks he would have to borrow from his wife."

But we do not think that there was any error in the exclusion of the evidence. It is manifest from the nature of the defence that the tendency of it would or might be to bring in private conversations between the defendant and her husband, and it is apparent that the presiding judge excluded the questions that were put because he was of opinion that such would be their effect. The defendant was allowed to introduce evidence that she had authorized no one else to purchase stocks for her, and would have been allowed to show that she had had no conversation with her husband in regard to the purchase of the stocks in question. But she wanted to go further and to show in effect that while she had had conversations with her husband in regard to the purchase of the stocks she had not authorized him to purchase them for her, that he was not her agent, and that her purpose in letting him have the bonds was to make a loan of them to him. There was no offer to show that any third person was present at any conversation between her and her husband, and, without going over the questions in detail, it seems to us, that the effect would have been, if they had been allowed to be put, to enable her either to give her construction of or the results of conversations between her and her husband which were not in themselves admissible and therefore that the questions were rightly excluded. *Providence Tool Co.* v. *United States Manuf. Co.* 120 Mass. 35. *Brown* v. *Wood*, 121 Mass. 137. *Commonwealth* v. *Cleary*, 152 Mass. 491. *Hyde* v. *Gannett*, 175 Mass. 177. *Fuller* v. *Fuller*, 177 Mass. 184.

Exceptions overruled.

ELIZA M. NICHOLS *vs.* GEORGE H. NICHOLS & others.

Essex. April 1, 1902. — May 22, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Partition. Joint Tenants and Tenants in Common. Estoppel.

The parties to a partition agreed that the commissioners might make the partition in the manner set forth in their report and requested them to do so, and agreed that it was the most advantageous division of the premises, but did not agree that no other division was possible. In determining which of the two larger portions should be allotted to each of two of the parties, each of whom had made a bid of the amount that he was willing to pay as owelty, the commissioners allotted the larger portion to the one making the higher bid, and ordered him to make certain payments to the other parties. Whereupon the party who had made the lower bid objected, denying the right of the commissioners to find that any owelty should be paid by one of the tenants in common to any other. *Held*, that by requesting the commissioners to make the partition and by agreeing that it was the most advantageous one that could be made, the lower bidder had waived his right to insist on formal findings by the commissioners that a more equal division was not possible or that the part set off to the higher bidder was not capable of division without great inconvenience to the owners, and that by taking part without objection in the method adopted by the commissioners for the purpose of ascertaining the sum to be paid as owelty he lost any right that he otherwise might have had to object to it.

MORTON, J. This is a petition for partition which was heard in the Probate Court, and afterwards, on appeal, was reserved for the full court; "such disposition to be made of the case as law and justice require." Commissioners were appointed by the Probate Court to make partition, and made a report, which, after due hearing, was set aside, and new commissioners were appointed. These commissioners made a report which was recommitted to them, and an amended report was subsequently filed by them. After due hearing this report was ordered to be accepted and partition was established according to it. The respondent Walter Nichols appealed from this decree and is the only party objecting thereto.

The commissioners reported that in making the partition the parties agreed to their making the division in the manner set forth in the report, and requested them so to do, and agreed that it was the most advantageous division of the premises, but did

not agree that no other division was possible. The commissioners also reported that, after they had determined at the request of the parties to divide the premises as set forth in the report, they "proceeded to determine which of the two larger portions should be allotted to said George, and which to said Walter, and the said George and the said Walter having each made many bids of the amount that such party was willing to pay as owelty for the part which we have allotted to said George, the largest amount of owelty offered was the sum of four thousand dollars which sum was offered by the said George and we thereupon set off said larger portion to said George as hereinbefore set forth." The said George and Walter were and are two of the respondents. In order to make the partition just and equal the commissioners found that George should pay to Eliza M. Nichols, Melville T. Nichols and Harold W. Nichols, the other parties to the proceedings, the sum of $1,100 in certain proportions, and to the said Walter Nichols the sum of $2,900. The respondent Walter Nichols denied the right of the commissioners "to find that any owelty should be paid by one of the tenants in common to any other." But the commissioners ruled against this contention. We understand that the objection was not taken by Walter until after George had outbid him and the commissioners had decided in consequence thereof to allot the larger portion to George.

We think that the decree of the Probate Court should be affirmed. The appellant contends that the partition was illegally and improperly made. The statute provides that when a part of the premises is of greater value than either party's share and cannot be divided without great inconvenience to the owners or when the whole real estate cannot be so divided the whole or a part may be set off to any one or more of the parties he or they paying any one or more of the others such sums as the commissioners may award to make the partition just and equal. Pub. Sts. c. 178, § 56. R. L. c. 184, § 41. It is clear that if the commissioners were of opinion that a part was of greater value than any one's share and could not be conveniently divided, they had a right to set it off to one or more and direct the payment by such party of such sums as would make the partition just and equal. The appellant contends that there was no finding by the

commissioners that a more equal division was not possible, or that the part that was set off to George was not capable of division without great inconvenience to the owners. But by requesting the commissioners to make the partition that was made, and agreeing that it was the most advantageous one that could be made, we think that the appellant must be regarded as having waived the formal findings now insisted on, and as having been content that the division agreed upon should be treated as the best practicable division, and the property be divided accordingly. We see no objection to such a course if all parties interested agree to or acquiesce in it. By taking part without objection in the method adopted by the commissioners for the purpose of ascertaining the sum to be paid as owelty, the appellant lost any right to object which he might otherwise have had. It was too late to object after the bidding had gone against him. The result is that we think that the decree should be affirmed.

So ordered.

J. H. Pearl, for Walter Nichols.

W. H. Niles & J. F. Batchelder, for George H. Nichols.

David G. Priesing *vs.* Robert Crampton.

Suffolk. April 2, 1902. — May 22, 1902.

Present: Holmes, C. J., Morton, Barker, Hammond, & Loring, JJ.

Partnership. Insolvency.

In an action for money lent to a partnership of which the defendant was a member, it appeared, that after the money was lent the partnership was dissolved, and the other partner assumed the debts and later was petitioned into insolvency. The plaintiff then began this action and ten days afterwards proved his claim in the insolvency proceedings and it was allowed. The defendant contended that these facts constituted a discharge of the defendant under Pub. Sts. c. 157, § 125. R. L. c. 163, § 142. *Held*, that the statute did not apply, not being intended to take away a creditor's previously existing rights. The insolvent was liable as a partner apart from the provision of the statute, and the proof against his estate was an equivocal act and not an election.

CONTRACT for $2,260, lent to a partnership of which the defendant was a member. Writ dated February 13, 1897.

At the trial in the Superior Court before *Lawton*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. P. Leahy & J. C. Pelletier, for the defendant.

J. F. Sweeney & G. A. Flynn, for the plaintiff.

HOLMES, C. J. This is an action for money lent to a partnership of which the defendant was a member. After the money was lent the partnership was dissolved and the other member, one Schlaffhorst, assumed the debts and later was petitioned into insolvency, on January 18, 1897. This suit was begun by the plaintiff's intestate on February 13, 1897. On February 23, of the same year, he proved his claim in the insolvency proceedings, and on March 12 his claim was allowed. It may be assumed that he knew of Schlaffhorst's agreement with the defendant. Schlaffhorst was discharged on October 15. These facts are relied on as a defence under Pub. Sts. c. 157, § 125. (R. L. c. 163, § 142.) By that section, under such circumstances as have been stated, "such debts may, if the creditors so elect, be proved against the estate of such insolvent debtor or debtors, and the proof and allowance thereof shall be a discharge of the party originally liable therefor."

The answer to this argument is not difficult. The section quoted cannot be construed as intended to take away a creditor's previously existing rights. It refers to a proof against the estate of the insolvent debtor as one of his separate creditors. This is made clearer by the language of the original act, St. 1865, c. 113, § 1, which is: "proved against the estate of such insolvent debtor or debtors, as his or their own debts." It is not to be presumed that the codification in the Public Statutes changed the meaning. The plaintiff had a right to prove against Schlaffhorst, apart from this provision, as Schlaffhorst was one of his original debtors. *Clarke* v. *Stanwood*, 166 Mass. 379. Hence the mere proof against him was an equivocal act and did not affect the plaintiff's right against the defendant. *Bucklin* v. *Bucklin*, 97 Mass. 256, 257. If, as in *Bucklin* v. *Bucklin*, he had received a dividend on an equal footing with the separate creditors of Schlaffhorst, the case would have been different.

But he received no dividend, as only preferred creditors were paid anything. Under other circumstances, proof alone with knowledge of the agreement might show an election, *Powers* v. *Mann*, 156 Mass. 375, but in the present case it was not enough.

Exceptions overruled.

GEORGE H. JONES & another *vs.* METROPOLITAN PARK COMMISSIONERS.

Suffolk. January 10, 13, 1902. — May 23, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Way. Assessments. Metropolitan Park Commissioners.

Under St. 1894, c. 288, authorizing the metropolitan park commissioners to construct roadways and boulevards, if betterments accruing from the locating and laying out of only a section of a parkway can be assessed before the whole parkway is completed, at any rate they cannot be assessed until the section itself is completed, the requirements of Pub. Sts. c. 51, § 1, being incorporated by reference in the act.

PETITION, filed June 7, 1901, for a writ of certiorari directed to the metropolitan park commissioners, to quash certain betterment assessments for the locating and laying out of a section of Revere Beach Parkway from Broadway to the Everett line.

The case came on to be heard before *Barker*, J., who, at the request of the parties, reserved it for the determination of the full court upon the pleadings and the statement of facts agreed, so far as competent; such decree to be entered as justice might require.

S. J. Elder & W. C. Wait, for the petitioners.

F. H. Nash, Assistant Attorney General, for the respondents.

LORING, J. This is a petition for a writ of certiorari to quash a betterment assessment laid upon the land of the petitioners for benefit to their land from the location and laying out of a section of a parkway laid out by the respondents under St. 1894, c. 288, and known as the Revere Beach Parkway. The petition was reserved for the consideration of this court upon the return of the commissioners and certain facts agreed to by the parties.

One of the objections of the petitioners is that the assessment

could not be laid until the work of construction was completed. Without considering the other objections urged, we think that this objection is well taken.

The assessment was laid for benefits accruing from the location and laying out of a section only of the parkway. Without considering whether an assessment can be laid for the location and laying out of a section, and whether the construction which must be completed is the construction of the whole way, it is enough in this case that the construction of the section in question was not completed.

It appears that the section in question "had been entirely constructed to subgrade," that the rough subgrading of the parkway within said taking was completed; that said parkway was ready for the superposition of crushed stone, except for the rounding and smoothing incident to the final preparation of the subgrade after the period allowed for settlement and compacting of the rough subgrade filling; that the macadamizing and surfacing to the grade of finished surface intended for travel had not been done, but was provided for under a subsequent contract, No. 54, . . . which was made at a date subsequent to the assessment of said betterment; that no part of the final surfacing of the parkway had been completed, and that the subgrade surface of said parkway was unsuitable for use by any vehicles, except those used by the contractors, and was not ready for public use, or intended for public use, and was in places fenced off to prevent its use by the public, and was so fenced off along some portions of the premises belonging to the petitioners."

The question whether a betterment assessment can be laid under St. 1894, c. 288, § 2, before the work of construction is completed, remains to be considered. The power given to the respondents the metropolitan park commission to lay betterment assessments by reason of the "locating and laying out" of a parkway is the same authority "conferred by chapter fifty-one of the Public Statutes upon boards of city or town officers authorized to lay out streets or ways, and the provisions of the first eight sections of said chapter, relating to ways, shall apply to such assessments by said board." Section 1 of c. 51 of the Public Statutes provides that "no such assessment shall . . . be made until the work of laying out . . . is completed."

The respondents' contention is that the provisions of Pub. Sts. c. 51, §§ 1–8, are binding on the park commissioners only so far as they are applicable. There is no such language in St. 1894, c. 288, § 2, but on the contrary the provision of that act is that the metropolitan park commissioners "shall have the same authority . . . as is conferred by chapter fifty-one of the Public Statutes." That authority is limited to laying an assessment when the work is completed and not before. But this is not of itself decisive.

The history of the legislation which was embodied in the provision of Pub. Sts. c. 51, § 1, forbidding a betterment assessment being laid for the construction of a public way before the construction of the way is completed, is gone into at length in *Foster* v. *Park Commissioners*, 133 Mass. 321, and need not be restated here; it is enough to point out that it has been the settled policy of Massachusetts for thirty years. The purpose of the enactment was to avoid the injustice of assessing upon land a betterment tax for an improvement which had not in fact been made, and which might never be completed unless the public authorities were forced to complete it by a writ of mandamus. See in this connection *Whiting* v. *Boston*, 106 Mass. 89.

It was held in *Foster* v. *Park Commissioners* that under St. 1875, c. 185, a betterment assessment could be laid for the "locating and laying out" of a park, before the park was completed; and this was supported on the ground that the benefit dealt with in that act was the benefit coming from the laying out of the park without any provision having been made for its construction. For a similar act see St. 1892, c. 341. On the other hand, for an act providing for betterment assessments only after the completion of a park, see St. 1874, c. 97.

When the project of giving the metropolitan park commissioners general authority to lay out boulevards and parkways connecting park and open spaces with cities and towns within the metropolitan district in question came up, if the parkway or boulevard was to be dealt with as a public way, the settled policy of the Commonwealth required that no assessment should be laid until the work of construction was completed; on the other hand there was a precedent for allowing an assessment before the work of construction was completed if the parkway

or boulevard was to be treated as a park. And it is manifest that the Legislature thought that betterment assessments in case of a parkway or boulevard partook more of those in case of a public way than those derived from laying out a park, and for that reason gave the commissioners "the same authority . . . as is conferred by chapter fifty-one of the Public Statutes."

This in our opinion is decisive of the matter, and it is not necessary to do more than refer briefly to the other arguments of the respondents. It is urged that since the commissioners cannot proceed unless they have an appropriation it could not have been the intention of the Legislature that this provision of Pub. Sts. c. 51, § 1, should apply. But St. 1894, c. 288, did not direct the commissioners to lay out any parkway or boulevard, it did no more than give them authority to do so; if the appropriations did not admit of the Revere Beach Parkway being laid out and completed under the law, it should not have been laid out. If by the true construction of the town boulevard act, St. 1893, c. 300, a betterment assessment can be laid before the work is completed, we do not think that that fact is decisive of the construction of St. 1894, c. 288, § 2.

The respondents have not raised the objection that a writ of certiorari is not the proper remedy in the case at bar, and, by agreeing to the facts, have waived the objection that on a petition for certiorari the facts found by them cannot be controverted. *Ward* v. *Aldermen of Newton*, *ante*, 432. *Janvrin* v. *Poole*, *ante*, 463. We therefore treat these objections as waived.

Writ to issue.

CHARLES H. ELDRED & another *vs.* JOHN W. DAVIS & others.

Suffolk. January 14, 1902. — May 23, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Deed, Construction.

At the time of his death W. owned an undivided half of certain land in Falmouth, the other undivided half being owned by L., one of his sons. The heirs at law of W. and the devisees under the will of another of his sons, each executed a deed conveying to L. "All my right, title, and interest to certain real estate situate in Falmouth aforesaid, as contained in the last will and testament of W., late of Falmouth, made and signed the 18th day of November, 1859; it being the eighth and last item of that will, which reads as follows: '8th. I give and bequeath to my son L. the use, income, and improvement of all my real estate during his natural life, and at his decease, to my children and to the issue of any deceased child.'" *Held*, that all the interest which the grantors had in the land passed by these deeds, whether acquired by inheritance from W. or as devisees under his will or under the will of his deceased son.

PETITION, filed August 27, 1901, for registration of title to certain land in Falmouth.

At the hearing in the Court of Registration before *Davis*, J., it appeared, that the petitioners claimed under Lorenzo Eldred who died on October 18, 1888, devising to them all his real estate, and under a deed procured by the petitioners from Mary A. Eldred and Jennie L. Minor, respectively the widow and so called adopted daughter of Frederick A. Eldred, brother of Lorenzo. Both Lorenzo and Frederick were the sons of William Eldred.

One undivided half of the title to the premises claimed by the petitioners was, at the time of his death, in William Eldred, who died at Falmouth, testate, between November, 1859, and March, 1860, leaving as his heirs at law four sons, one daughter, and the children of a deceased daughter. The title to the other undivided half was, at the time of William's death, in his son, Lorenzo.

After the death of Frederick, Lorenzo procured deeds to himself from all the living heirs of his father William. These deeds

were all in the same form of limited warranty, and the description in each was as follows: "All my right, title, and interest to certain real estate situate in Falmouth aforesaid, as contained in the last will and testament of William Eldred, late of Falmouth, made and signed the 18th day of November, 1859; it being the eighth and last item of that will, which reads as follows: '8th. I give and bequeath to my son Lorenzo Eldred the use, income, and improvement of all my real estate during his natural life, and at his decease, to my children and to the issue of any deceased child.'" The clause was correctly quoted from the will.

Frederick died on March 14, 1874, testate, leaving a widow, Mary A. Eldred, and a so called adopted daughter, Jennie L. Minor, who were named as devisees in his will, proved at Worcester on April 7, 1874.

On July 3, 1893, the petitioners procured from Mary A. Eldred and Jennie L. Minor a deed in which exactly the same description was used as in the above-mentioned deeds to Lorenzo, there being added at the end of the description, following the quotation from the will of William Eldred, "Our interest, if any, being derived from the will of Frederick A. Eldred, late of Worcester, Mass., intending hereby to release all our interest in any real estate in said Falmouth in which said William Eldred had any interest at the time of his death."

On November 12, 1897, the petitioners procured a further deed from Mary A. Eldred, executrix under the will of Frederick A. Eldred, which the court found it unnecessary to pass upon.

Among other rulings, which the decision of the court has made immaterial, the judge ruled as follows: That the several deeds to Lorenzo Eldred from the heirs of William Eldred were sufficient to convey, and did convey, to Lorenzo any and all interest owned by the several grantors in the locus, whether acquired by inheritance from, or as purchasers by devise under the wills of both William Eldred and Frederick A. Eldred.

The judge ordered a decree for the petitioners; and the respondents alleged exceptions.

H. E. Perkins, for the respondents.

C. H. Swan, guardian *ad litem*, addressed the court but did not file a brief.

C. F. Chamberlayne, for the petitioners.

LATHROP, J. It does not seem necessary for us in this case to determine whether the title to William Eldred's undivided half interest in the locus vested at his death, subject to the life estate devised under his will to Lorenzo, in his heirs at law by descent, or whether it passed to them under the will. See *Ellis* v. *Page*, 7 Cush. 161; *Sears* v. *Russell*, 8 Gray, 86, 93. Nor do we find it necessary to determine whether the widow of Frederick A. Eldred had power under his will as executrix to make the deed of November 12, 1897, nor to consider the precise construction of the will of Frederick. It is evident that the interest of Frederick in William's estate was in the widow, Jennie L. Minor, and the testator's blood relations, who were three brothers, a sister, and the children of a deceased sister. These, including Lorenzo, were the living heirs of his father William.

The real question in the case depends upon the effect of the deeds obtained by Lorenzo after the death of Frederick, and upon the effect of the deed obtained by the petitioners from the widow of Frederick and Jennie L. Minor.

We cannot doubt that under the deeds to Lorenzo Eldred from the heirs of William Eldred, all the interest which the heirs had in the locus passed, whether acquired by inheritance from William Eldred, or as devisees under the wills of both William Eldred and Frederick A. Eldred; and that the petitioners also acquired, under the deed of July 3, 1893, from Mary A. Eldred and Jennie L. Minor, all their interest in the locus. The reference to the will was only for the purpose of indicating one source of the grantors' title. *Whitman* v. *Whitman*, 7 Met. 268. *Moran* v. *Somes*, 154 Mass. 200, and cases cited.

Exceptions overruled.

JOHN ABBOTT *vs.* FREDERICK A. GASKINS.

Suffolk. January 15, 1902. — May 23, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Probate Court. Jurisdiction. Compromise.

The Probate Court has no jurisdiction to confirm agreements of compromise under Pub. Sts. c. 142, § 14, and a decree of that court purporting to confirm such an agreement is void.

In a suit in equity to enforce a contract to purchase certain land from the plaintiff, where the only defence was that the plaintiff could not give a good title, it appeared, that the plaintiff claimed under a deed from the executors under a certain will and that the will had been allowed by the Probate Court in pursuance of an agreement of compromise under Pub. Sts. c. 142, § 14, which had been confirmed by another decree of the same Probate Court immediately preceding. The decree allowing the will provided that the will was to be administered in accordance with the agreement of compromise confirmed by the preceding decree. The will gave the executors power to sell real estate. *Held*, that the plaintiff had no title because the Probate Court had no jurisdiction to confirm an agreement of compromise under Pub. Sts. c. 142, § 14; and the bill was dismissed.

BILL IN EQUITY, filed in the Superior Court for the County of Suffolk August 17, 1901, for the specific performance of an agreement in writing to purchase from the plaintiff a certain lot of land on Dover Street in Worcester.

The defendant in his answer admitted that he made the agreement and signed the memorandum for the purchase of the land in Worcester, as set forth in the bill, and that the plaintiff tendered to him a quitclaim deed purporting to convey the land, but denied that the plaintiff tendered to him a good and sufficient deed conveying a good and clear title to the land, as required by the agreement, and alleged that the plaintiff was unable so to do.

In the Superior Court the case came on to be heard before *Fessenden*, J., who, at the request of the parties, reserved it upon the bill, answer and agreed statement of facts for the consideration of this court, such decree or order to be made as justice and equity might require.

By the agreed facts it appeared, that the land in question belonged to William T. Merrifield of Worcester at the time of his death.

Merrifield died leaving a will, which was offered for probate; and while the matter of its allowance was pending, a petition was filed in the Probate Court, stating, that a controversy had arisen between the devisees and legatees under the will and the persons entitled to the estate under the statutes regulating the descent and distribution of intestate estates, and praying that the court authorize and confirm a compromise which had been arranged by the parties in interest. All parties interested assented to the compromise, some acting through attorneys and some through guardians. The Probate Court thereupon entered a decree approving the agreement of compromise and ordering that the executors be authorized to administer the estate of Merrifield under the will as modified, restricted and controlled by the agreement of compromise as set forth in the petition and confirmed by that court, and that all the real estate and personal property referred to in the agreement of compromise should respectively vest in and be taken by the devisees and legatees and parties to the agreement of compromise exactly in accordance with the terms and provisions of that agreement.

Upon the same day the Probate Court made a second decree, upon the petition of William F. Merrifield, Henry K. Merrifield and Harriette M. Forbes for the allowance of the will of Merrifield, as follows:

"It is decreed that said instrument be approved and allowed as the last will and testament of said deceased, but to be executed according to the terms of a compromise authorized and confirmed by this Court by a decree entered this day upon a petition in equity of Guy Merrifield French *v.* William F. Merrifield *et al.*, and letters testamentary be issued to said petitioners, they first giving bonds, without sureties, for the due performance of said trust."

The will of Merrifield contained the following:

"And I hereby direct authorized and empower the executors herein named to sell any and all my real estate when they shall consider it for the best interest of said estate.

"I hereby nominate my said sons William F. Merrifield and Henry K. Merrifield and my said daughter Hattie Forbes and William T. Forbes joint executors of this my last will and testament and I request that no surity or sureties be required

of them on their bond for the execution of the trusts herein created."

William T. Forbes declined to serve as executor. William T. Merrifield, Henry K. Merrifield and Harriette M. Forbes qualified as executors, gave bonds approved by the court, and proceeded to administer the estate in accordance with the decrees.

William T. Merrifield, Henry K. Merrifield and Harriette M. Forbes in the exercise of their powers under the decrees, conveyed to one Liscomb the land described in the agreement of purchase set out in the plaintiff's bill, and the land by mesne conveyances came to the plaintiff, holder of the record title.

The defendant did not raise any objection as to the form of the deed, and asked the judgment of this court only upon the question whether Liscomb received a free and clear title to the real estate, submitting, that the Probate Court had no jurisdiction in the matter of confirming the compromise of the will, that, as the Probate Court did not have jurisdiction in the premises, its decree was void *ab initio*, and that as the decree was void the consent of parties did not give it force. No other question was argued on either side, and the point was not taken, that if the first decree was void the second decree might be valid so far as it allowed the will.*

S. Lincoln, for the plaintiff.

J. Lowell, for the defendant.

HAMMOND, J. The sole question presented by this case is whether the power given to the Supreme Judicial Court by Pub. Sts. c. 142, § 14, is also given to probate courts by St. 1891, c. 415, § 1.

The first statute is as follows: "The Supreme Judicial Court, sitting in equity, may authorize the persons named as executors in an instrument purporting to be the last will of a person deceased to adjust by arbitration or compromise any controversy that may arise between the persons claiming as devisees or legatees under such will and the persons entitled to the estate of the deceased under the statutes regulating the descent and distribution of intestate estates; to which arbitration or compromise the persons named as executors, those claiming as devi-

* See *Bartlett* v. *Slater*, 182 Mass.

sees or legatees, and those claiming the estate as intestate, shall be parties."

The second is as follows: "The probate courts shall have jurisdiction in equity, concurrently with any other court having jurisdiction of proceedings in equity, of all cases and matters relating to the administration of estates of deceased persons or to wills or trusts created by will, and such jurisdiction may be exercised upon petition, according to the usual course of proceedings in the probate courts."

It becomes necessary to consider briefly the state of equity jurisdiction in this Commonwealth at the time of the passage of the second statute. Limited equity jurisdiction had been granted to the Supreme Judicial Court from time to time, but finally, by virtue of St. 1877, c. 178, § 1, the court became possessed of "jurisdiction in equity of all cases and matters of equity cognizable under the general principles of equity jurisprudence," and as to such matters it became "a court of general equity jurisdiction." Speaking in a general way, it may be said that the various statutes under which this jurisdiction was granted were substantially re-enacted in Pub. Sts. c. 151, §§ 1–4.

This court "sitting in equity" also had jurisdiction in certain other cases outside the general principles of equity jurisprudence, some of which are enumerated by Morton, C. J., in delivering the opinion in *Baldwin* v. *Wilbraham*, 140 Mass. 459.

The Probate Court also had jurisdiction in equity to hear and determine all matters relating to trusts created by will and various other matters not material to this inquiry. See *Swasey* v. *Jaques*, 144 Mass. 135, and the statutes and cases therein cited.

In this situation, St. 1883, c. 223, was passed. It conferred upon the Superior Court "original and concurrent jurisdiction with the supreme judicial court in all matters in which relief or discovery in equity is sought, with all the powers and authorities incident to such jurisdiction," with authority to "issue all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations and persons when necessary to secure justice and equity." § 1. In *Baldwin* v. *Wilbraham*, *ubi supra*, Morton, C. J. speaks of this statute as follows: "The language of the statute is broad, and, without doubt, it was intended to confer upon the Superior Court

concurrent jurisdiction in equity in all suits between individuals involving private rights, of which the Supreme Judicial Court has jurisdiction by virtue of the general principles of equity jurisprudence." In that case, however, it was held that the Superior Court did not have jurisdiction in equity over a petition brought under Pub. Sts. c. 27, § 129, by ten taxable inhabitants to restrain a town from an alleged illegal expenditure of money, that not being a matter within the general principles of equity jurisprudence; and it was said that the intention of the Legislature was "to give the Superior Court concurrent jurisdiction in all matters within the scope of the general equity jurisprudence, but to retain within the exclusive jurisdiction of the Supreme Judicial Court other special bills, writs, or petitions allowed by our statutes, in which relief in equity is prayed for." This decision was made and published in the early part of the year 1886, five years before St. 1891, c. 415, was passed. See also *Langmaid* v. *Reed*, 159 Mass. 409; *Steele* v. *Municipal Signal Co.* 160 Mass. 36; *Barker* v. *Mackay*, 168 Mass. 76, where the same rule is applied.

In the light of the previous statutes, including St. 1883, c. 223, and of the interpretation given as above stated to the one last named, St. 1891, c. 415, was passed. It confers upon the probate courts "jurisdiction in equity, concurrently with any other court having jurisdiction of proceedings in equity, of all cases and matters relating to the administration of estates of deceased persons," etc., "and such jurisdiction may be exercised upon petition, according to the usual course of proceedings in the probate courts." We can see no satisfactory ground upon which it can be said that the kind of "jurisdiction in equity" conferred upon the probate courts is any broader than that conferred upon the Superior Court in St. 1883, c. 223; and when we consider the state of the statutory law concerning jurisdiction in equity and the interpretation which had been given to St. 1883, c. 223, in the first case above cited, we are driven to the conclusion that the jurisdiction in equity conferred upon probate courts by St. 1891, c. 415, is simply jurisdiction within the scope of general equity jurisprudence as to the cases and matters therein named. If the Legislature intended to grant anything more, it is to be supposed that it would have expressed the intention clearly, and

would not have left it to be inferred from the general terms used.

It is urged by the plaintiff that the power conferred by Pub. Sts. c. 142, § 14, is one which is included in the general equity powers exercised by English courts of chancery, and is cognizable under the general principles of equity jurisprudence; and he cites several cases. But all the cases presuppose an actual valid agreement voluntarily made, and the purpose of each suit is to enforce the agreement. A very good illustration of this is found in our own books in *Leach* v. *Fobes*, 11 Gray, 506. There the female plaintiff, the sole heir at law of the testator, and the defendant, who was his widow and the stepmother of the plaintiff, had a controversy as to whether the will should be admitted to probate. They finally made an agreement under seal by which the plaintiff received more than she would have received under the will. The defendant afterwards repudiated the agreement and procured the will to be admitted to probate. The action was to compel a specific performance of the agreement, and there was a decree for the plaintiff. There can be no doubt that equity will reach such a case. An agreement is none the less such by reason of the fact that the withdrawal of an objection to the allowance of a will or a change in the rights created by a will is one of its features.

But the proceeding under Pub. Sts. c. 142, § 14, is entirely different. It is not the purpose of this statute to enforce an agreement. There is no contest over the agreement when it reaches the court. The sole purpose is to allow it to become operative. If all the parties are of age, the assistance of the court is not needed. *Leach* v. *Fobes*, 11 Gray, 506. *Gordon* v. *Gordon*, 3 Swanst. 476. See also cases cited in Beach, Modern Eq. Jur. § 1003, and cases therein cited.

But there are many cases where, by reason of minority or otherwise, the parties are unable to execute an agreement that shall be binding upon them, and, in the language of § 15 of the same chapter, there are frequently future contingent interests affecting the parties in being and parties not in being, and there is no way in which these interests can be affected by any agreement. In such a case, the statute acts to relieve the situation, not, however, to enforce an agreement, but to breathe life into it. If

subsequently there be occasion to enforce it against one who refuses to stand by it, then the matter is one of general equity jurisdiction. But the action of the court in the first instance "is anomalous and rests upon the statutes." *Elder* v. *Adams*, 180 Mass. 303.

The result is that the decree of the Probate Court is invalid for want of jurisdiction. This construction of the St. 1891, c. 415, seems also to have been the one adopted by the Legislature in the new codification of the statutes. See R. L. c. 148, § 15, and c. 162, § 5.

Bill dismissed.

ATTORNEY GENERAL *vs.* VINEYARD GROVE COMPANY.

Suffolk. March 14, 1902. — May 23, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Vineyard Grove Company. Statute, Construction. *Easement*, Dedication, Adverse possession.

St. 1870, c. 110, creating the Vineyard Grove Company and authorizing it to hold land, and with the approval of the harbor commissioners to construct and maintain a wharf or wharves in tide water, and St. 1896, c. 299, confirming the right of that company to hold real estate theretofore conveyed to it and to maintain structures in tide water, do not enlarge the rights of that company as against the public and permit it to maintain a structure in violation of a dedication to the public made by its predecessor in title. Still less can a license granted by the harbor and land commissioners in pursuance of those statutes have that effect, the license containing a provision that nothing in it "shall be so construed as to impair the legal rights of any person."

The right to have land unbuilt upon within reasonable limits for purposes of light, air and prospect can be acquired by dedication.

If the right of the public acquired by dedication to use a certain beach and to have the view from the bluffs above it kept clear, could be barred by adverse possession, the maintenance of a building on the bluff called a pavilion or pagoda, and of bathing houses and a wharf on the beach below, all contemplated in the plan of dedication, not substantially interfering with the tract or the view from above it and naturally incidental to the public use, does not show an intent to exclude the public from any portion of the tract which the structures do not occupy, and the existence of the structures, however long maintained, could not be made the foundation of a right more extensive than over the ground actually occupied by them.

INFORMATION by the Attorney General, filed March 22, 1897, to establish the dedication of the shore front of a tract of land

developed by the Oak Bluffs Land and Wharf Company in forming the town of Cottage City and afterwards acquired by the defendant under the statutes named by the court, praying that the defendant be enjoined from conveying any portion of the beach or interfering in any way with its public use, and that the defendant be commanded to remove every structure upon the beach extending above the bluff adjoining it.

The case came on to be heard before *Morton*, J., who overruled the defendant's exceptions to the master's report, so far as they related to questions of fact, the defendant excepting thereto, and reserved the case for the consideration of the full court upon the pleadings, the master's report, the exceptions of both parties thereto, and the defendant's above exception, such disposition to be made of the case as to the full court should seem meet.

G. W. Cox, (*W. M. Butler* with him,) for the plaintiff.

W. H. Powers, for the defendant.

HOLMES, C. J. This is an information for the purpose of removing a structure alleged to be an encroachment upon land dedicated to the public. The structure complained of is a building which rises above the edge of a bluff facing the sea in Cottage City, Martha's Vineyard, and is built upon land found by the master to have been dedicated to the public by the defendant's predecessor in title. It also interferes with the view from the bluff which was embraced in the dedication. The master reports that there should be a decree for the removal of so much of the building as rises above the level of the edge of the bluff. We will deal with the defences in the order in which they were presented by the defendant.

In the first place it is said that the defendant is authorized to build such buildings as it deems advisable on the land in question by its charter and a later act. St. 1870, c. 110, § 2. St. 1896, c. 299. But these acts have no such purport. They define the powers of the corporation within the limits of its title, but they do not confer a title. They no more purport to renounce rights of the public than to exercise the power of eminent domain over private rights. So as to a license from the harbor and land commissioners granted in pursuance of these statutes. Indeed, this license provides in terms that nothing in it "shall be so construed as to impair the legal rights of any

person." A different construction would not be given to these statutes unless it was plainly necessary, whereas here the more limited meaning is plain. *Old Colony Railroad* v. *Framingham Water Co.* 153 Mass. 561, 563. It is unnecessary to consider whether it would have been within the power of the Legislature thus to give to a private person for no public use the rights acquired by dedication. *New Orleans* v. *United States*, 10 Pet. 662, 720, 723. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289, 290. *Davenport* v. *Buffington*, 97 Fed. Rep. 234, 239.

Next it is said that the master should have ruled that there could be no dedication for the purpose of a view, as against the plaintiff's contention that one of the purposes of the dedication was to keep the view of the sea unobstructed. The analogy relied on is the rule that a right of prospect cannot be acquired by prescription. The question does not appear to be open in this broad form, but it may be answered. The right to have land unbuilt upon within reasonable limits, for purposes of light, air and prospect can be acquired by grant, *Ladd* v. *Boston*, 151 Mass. 585, and dedication stands on the principles of grant, not on those of prescription. If it ever is consistent with public policy to have the individual appropriation of land thus restricted, there can be few objects which offer such strong reasons for encouraging the restriction as does that of keeping open the line of the shore and the view of the sea for all. See *Higginson* v. *Nahant*, 11 Allen, 530; *Attorney General* v. *Abbott*, 154 Mass. 323, 328.

The defendant founds an argument upon the chain of deeds under which it holds. We assume that the defendant owns the fee of the land, but the fact that it does so is consistent with the public right. The line of deeds taken by itself might lead to the conclusion that the land had been held adversely to any public rights, but we have not all the evidence before us and have no reason to doubt that the master's finding was correct. There is nothing to show that the locus could not be dedicated to the public.

The defendant set up a title freed by adverse possession from the public right. It is unnecessary to consider whether or how far it could bar the public right in that way. See *New Salem* v. *Eagle Mill Co.* 138 Mass. 8; *Attorney General* v. *Tarr*, 148

Mass. 309; Pub. Sts. c. 54, § 1; c. 196, § 11; R. L. c. 53, § 1; c. 202, § 30. It is enough to say that there was no evidence of such possession for a sufficient time. The building complained of was not erected until 1896. The defendant argues that the whole land above high water mark has been held by its predecessors in title and itself adversely to the public. The chief facts relied on, a building on the bluff called a pavilion or pagoda, bathing houses, and a wharf, were contemplated in the plan of dedication. But apart from that, these and a railroad under the bluff and any other matters shown were quite insufficient to express and obviously did not embody an intent to exclude the public from any portion of the tract in question which they did not occupy. The tract and the view from above it were left substantially uninterfered with, and the structures for the most part were naturally incidental to the public use. However long maintained they could not be construed to establish a right more extensive than over the ground actually occupied by them. See *Kerslake* v. *Cummings*, 180 Mass. 65, 68; *New Orleans* v. *United States*, 10 Pet. 662, 715, 716. There is nothing else argued by the defendant that calls for special remark.

The master reports that the defendant should be ordered to remove so much of the building as is above the level of the bluff. In view of this finding we are not prepared to say that so much of the building as is below the level may not be consistent with the scheme of the dedication. But it is plain that the defendant has no general right to build upon the tract in question, and no right such as it claims by its answer to exclude the public from the tract. An injunction may be framed to cover these points.

Decree for plaintiff.

JOHN S. STRATTON & others *vs.* CITY OF LOWELL & others.

Middlesex. March 17, 1902. — May 23, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Municipal Corporations. Lowell.

Under St. 1896, c. 415, the city council of Lowell has no power to make contracts for the city, but it has the power to make appropriations, and by § 8 it is provided, that "no liability shall be incurred . . . until the city council has duly voted an appropriation sufficient to meet such expenditure or liability," and that no sum "appropriated for a specific purpose" shall be expended for any other purpose. Under § 6 the board of health as the head of a department have authority to make contracts for that department. The city council voted, to borrow $25,000 for the purchase and erection of a "Smith Improved Garbage Cremator," and appropriated the sum named for that purpose, to be expended under the direction of the mayor and the board of health. The record of a meeting of the board of health showed a vote to ask the Smith company for plans and specifications and a refusal by a majority of the board to ask for bids from other companies because after the action of the city council it would be useless. Later, at a regular meeting of the board, it was voted, that the record be amended by striking out the statement of the reason for the refusal, and by stating the true reason, that the majority of the board after investigation of the merits of the rival cremators, decided that the best interest of the city would be served by the selection of the Smith Cremator. On a petition of ten taxable inhabitants to enjoin the expenditure, it was *held*, that the appropriation by the city council was in lawful form, and that the court could not go behind the amended record of the board of health, and, at any rate, that the adoption of the amendment declared by necessary implication that in the present opinion of the board it was desirable to purchase the Smith Cremator on grounds independent of the vote of the city council, therefore, that the purchase was authorized by the unbiassed action of the board having authority to make it and the bill must be dismissed.

HOLMES, C. J. This is a petition by ten taxable inhabitants of the city of Lowell, brought under St. 1898, c. 490, amending Pub. Sts. c. 27, § 129. It is brought against the city of Lowell and its board of health to enjoin the borrowing or expending of the sum of $25,000 for the purchase and erection of a Smith Improved Garbage Cremator. The facts, in short, are that the city council voted to borrow the said sum for the purpose just mentioned, and appropriated the amount to the credit of the purchase and equipment of the cremator, the same to be expended under the direction of the mayor and the

board of health. The records of the board of health disclosed instructions to its agent to ask the Smith company for plans and specifications and a refusal by a majority of the board to request another company to submit a proposition, the refusal being on the ground that the city council having already voted for a Smith Cremator it would be useless for another company to offer estimates. Later, at a regular meeting of the board, it was voted that the record be amended by striking out the statement of the reasons for the refusal, the true reason being stated to be that the majority of the board after investigation of the merits of the rival cremators, decided that the best interest of the city would be served by the selection of the Smith Cremator. The judge of the Superior Court found that the original record "correctly stated the action" of the health department and that the health department felt bound by the order of the city council and was about to make a contract without the exercise of its own judgment. He therefore ordered an injunction and reported the case.

The ground of the order is that under the charter of the city, St. 1896, c. 415, § 7, the city council has no power to meddle with the making of the contract, that its order was void as an attempt to do so, and that the intended action of the board of health would be unauthorized because not an expression of the independent judgment of the board, apart from other reasons. *Goddard* v. *Lowell*, 179 Mass. 496. But we are of opinion that the present case must be distinguished from the one just cited. In that there was a direct attempt to control the contracts of the board of health by ordinance. Here there was only an appropriation. By § 8 of the charter no contract could be made until there was an appropriation, so that the act of the city council was the necessary first step if a cremator was to be bought. It is true that the appropriation specified the kind of cremator to be purchased, but it is contemplated by the first words of § 8 that a sum may be "appropriated for a specific purpose." It is true again that the sum so appropriated could not be expended for any other purpose and therefore that the board of health was limited in its power to contract. But the purchasing departments always are limited by the necessity for a preliminary appropriation. That the statute intends. All that is

requisite to satisfy the charter is that, whatever the form of the appropriation, the department making the purchase should use its independent judgment and not make itself merely a mouthpiece for the city council. It is true, again, that the judge has found that the board has not used its independent judgment, but it appears to us that this conclusion was based upon too bold an inquiry into the facts. We cannot go behind the record of the board of health. For even if we should hold technical rules inapplicable (*Halleck* v. *Boylston*, 117 Mass. 469, 470), the board by the amendment of its record did at least declare by necessary implication that in its present opinion it was desirable to purchase the Smith Cremator, on grounds independent of the city council's vote. We cannot go behind the declaration of the board. If, after a valid appropriation, a board having power to purchase says that in its unbiassed judgment it is desirable that a certain purchase should be made, a court cannot undertake to contradict it and to declare judicially that its judgment is not free.

Bill dismissed.

F. W. Qua, for the respondents.
J. F. Manning, for the petitioners.

ELIHU CHAUNCEY, trustee, *vs.* JOSEPH G. FRANCIS, administrator, & others.

Suffolk. March 17, 1902. — May 23, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Devise and Legacy, Construction.

A will contained the following bequest: "I give and bequeath to my brother Stephen Salisbury the sum of one thousand dollars, in trust, for my nephew Samuel Salisbury, to invest the same and pay the interest of the same to said Samuel or expend the same for his benefit as said trustee may deem best, and with full power to expend any part or the whole of the principal sum for the benefit of said Samuel, said trustee to be accountable to no one, for the administration of the trust, and not to give bonds." This was preceded and followed in the will by a number of simple absolute bequests of sums of money. In the rest of the will this $1,000 was not mentioned again. In the clauses relating to real

estate, equitable estates for life with remainders in fee were created by apt and appropriate language. The will concluded with a residuary clause. *Held*, that Samuel Salisbury was the sole equitable owner of the fund subject to the directions as to its management during his life, and that on his death it went to the representative of his estate and not to the residuary legatee.

BILL FOR INSTRUCTIONS, filed December 3, 1901, by the trustee under the will of Ann G. Salisbury, as to the interpretation of a bequest for the benefit of Samuel Salisbury.

The case came on to be heard before *Morton*, J., who, with the consent of the parties, reserved it upon the bill, answers and a copy of the will for the consideration of the full court; such decree to be entered as equity and justice might require.

The fifth clause of the will, which contained the bequest in question, was as follows:

"I give and bequeath to my brother Stephen Salisbury the sum of one thousand dollars, in trust, for my nephew Samuel Salisbury, to invest the same and pay the interest of the same to said Samuel or expend the same for his benefit as said trustee may deem best and with full power to expend any part or the whole of the principal sum for the benefit of said Samuel, said trustee to be accountable to no one, for the administration of the trust, and not to give bonds."

The character of the rest of the will is described by the court.

R. B. Stone, for Blanche L. Salisbury and Joseph G. Francis, administrator.

E. N. Jones, for Theodore S. Woolsey and Elihu Chauncey, executors and trustees under the will of Daniel W. Salisbury.

HAMMOND, J. The sole question is what interest did Samuel Salisbury have in the trust fund created by the fifth clause of the will. It is contended by the representatives of his estate that he had the complete beneficial interest in the fund, and that the various provisions as to the trust merely limit his use and enjoyment of it during his life; while on the other hand the executors of the will of Daniel W. Salisbury, the residuary legatee, contend that the interest was simply an equitable life estate.

We are brought to the consideration of this question without any knowledge respecting the situation at the time the will was made, and hence our decision must be based substantially upon such things as appear upon the face of the will and codicil, and

upon such inferences of fact as fairly may be drawn therefrom. The testatrix having determined to make a will, enters upon the task. She is a single woman, apparently somewhat advanced in years. She has brothers, sisters, nieces and nephews. She possesses in her own right estate both real and personal, and she also has under her father's will a power of appointment over certain other real estate. She begins with legacies of personal property. In the second, third and fourth clauses of the will she gives various legacies of money to her brother Stephen, and to several nieces and nephews, respectively. The language in which each of these legacies is given is very brief and simple. As an illustration of this, the bequest immediately preceding the one in question may be quoted: "I give and bequeath to my nephew Elihu Chauncey the sum of one thousand dollars." She then comes to her nephew Samuel Salisbury. All the preceding bequests she has made absolute, but as to Samuel she thinks differently. She is willing to give him an interest in $1,000, but for some reason is not inclined to let him have the control of it. She decides to place the money in the hands of her brother Stephen, not for himself, but in trust for Samuel. She says that Stephen may pay the interest to Samuel or expend the same for his benefit as Stephen may deem best. So much as to the income. As to the principal, she is not willing that any part of it shall be paid to Samuel, but is willing that even the whole of it may be expended for his benefit if Stephen chooses to do it. Having made this provision as to Samuel, she says no more about this $1,000 but proceeds to give in the next four clauses of the will legacies of money to individuals in the same brief language as in the clauses preceding the clause in question. She then in several subsequent clauses goes on to dispose of certain personal and real estate held by her in her own right and of certain real estate over which she has the power of appointment, and closes with a residuary clause in favor of her brother Daniel. In the clauses respecting real estate she creates by apt and appropriate language legal and equitable estates for life and provides for the disposition of the remainder in fee, and there is no reason why she should not have used similar language for the disposition of the remainder of the trust fund created in the clause in question if

she had intended that the interest in the whole of the fund should not pass to her nephew Samuel.

Reading the clause in question in connection with its position in the will and in the light of the whole will, including the fact that there is no specific bequest over of the fund remaining at the death of Samuel, we think that the most natural interpretation of it is that the $1,000 was set apart to be held upon a general trust for Samuel; that he was the sole equitable owner of the fund, and that the directions to the trustee were for the management of the trust during the lifetime of the beneficiary. It follows that the fund goes to the representative of his estate. See *Fay* v. *Phipps*, 10 Met. 341.

So ordered.

ELIHU CHAUNCEY, trustee, *vs.* BLANCHE L. SALISBURY & others.

Suffolk. March 17, 1902. — May 23, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Devise and Legacy, Construction.

A testatrix began her will by declaring her intention of disposing of her whole property. She then created a life estate in her whole property, divided the remainder into two equal parts, and fully provided for the final disposition of the first part. She then provided, that the other half should be equally divided among six nephews and nieces named, and added "the sum I bequeath to William Salisbury and the sum I bequeath to Sam Salisbury I wish put in trust to Elihu Chauncey and they should have the income only." The persons thus named were two of the six. *Held*, that the bequest to "Sam Salisbury" was an absolute gift, subject to the provision that he should be entitled only to the income during his life, and that upon his death the fund went to the administrator of his estate.

BILL FOR INSTRUCTIONS, filed December 3, 1901, by the trustee under the will of Sarah Austin.

This case came on to be heard before *Morton*, J., who, with the consent of the parties, reserved it upon the bill and answers, and a copy of the will of Sarah Austin, for the consideration of the full court; such decree to be entered as equity and justice might require.

The will was as follows:

"I Sarah Austin of Boston in the County of Suffolk State of Massachusetts Widow being of sound and disposing mind and memory and desirous of disposing of my worldly estate while I have strength I do publish & declare this my last will & testament hereby making void all other wills & testaments heretofore made by me.

"I hereby bequeath and dispose all my estate real and personal of which I shall be entitled at the time of my decease the manner following to wit.

"I hereby constitute & appoint my nephew Elihu Chauncey sole executor of my last will and testament and request and direct that he shall not be required to give bonds as said executor and I authorize my said executor to sell any portion of my real estate in public or private sale and I direct my said Executor to pay all my just debts & funeral expenses as soon as may be done after my decease also the legacies hereafter named and I further ask my said executor to erect at Mt Auburn a monument for me like the one raised to Mrs Denny in Uncle Tappans lot — An Angel pointing toward Heaven.

"I give & bequeath to my brother Waldo Salisbury and my sister Rebecca Salisbury all my property real and personal. My share in the Summer Street estate also Central Court my share in Temple Place estate Haverhill Street and any other real estate of which I shall die possessed during their natural lives the income of all to be used by them.

"After my decease I give to my nephew Charles Chauncey my shares in the Nashua Factory also Amoskeag and any other shares in Factories held in trust by my brother Waldo Salisbury.

"After the death of my brother Waldo Salisbury & my sister Rebecca Salisbury I give and bequeath half my property of which I shall die possessed to my nephew Charles Chauncey during his life. If he die without heirs I give the half of my property to Elihu Chauncey during his life. If neither of them have heirs at their decease I give it to be divided among my nieces & nephews children of my brother Stephen Salisbury. If Charles or Elihu Chauncey have children the property is to go to them.

"I give & bequeath to Sarah Ann Tasker of Reading the sum of one hundred dollars.

"Having given the half of my property at the decease of my brother Waldo & sister Rebecca to Charles Chauncey The remaining half I wish divided among my nephew and nieces the children of my brothers Stephen and my eldest brother Sam. They consist of Annie Woolsey William Salisbury Elizabeth FitzGerald Sally Walker Agnes Chauncey Salisbury children of my brother Stephen also Sam Salisbury at the West son of my brother Sam to be divided equally among them.

"The sum I bequeath to William Salisbury and the sum I bequeath to Sam Salisbury I wish put in trust to Elihu Chauncey & they should have the income only.

"I desire that the last survivor of the two sons of my sister Elizabeth being at the time of his death without issue shall have full power to dispose of all the property coming to him through this will by his last will and testament in writing or the nature of a last will to any one or more of the issue of my brother Stephen.

"I give to Carrie FitzGerald Stephen FitzGerald Robert Walker & Salisbury Woolsey one hundred dollars."

There were two codicils containing certain small bequests in no way material to this case.

R. B. Stone, for Blanche L. Salisbury, and Joseph G. Francis, administrator.

H. G. Allen & H. W. Conant, for William C. G. Salisbury.

E. N. Jones, for Charles Chauncey and others.

J. J. Higgins, guardian *ad litem* for certain minors.

HAMMOND, J. This case calls for the determination of the nature of the bequest to Samuel Salisbury under the following clause of his aunt Sarah's will: "Having given the half of my property at the decease of my brother Waldo & sister Rebecca to Charles Chauncey The remaining half I wish divided among my nephew and nieces the children of my brothers Stephen and my eldest brother Sam. They consist of Annie Woolsey William Salisbury Elizabeth FitzGerald Sally Walker Agnes Chauncey Salisbury children of my brother Stephen also Sam Salisbury at the West son of my brother Sam to be divided equally among them. The sum I bequeath to William Salisbury and the sum I bequeath to Sam Salisbury I wish put in trust to Elihu Chauncey & they should have the income only."

As in the case of *Chauncey* v. *Francis*, *ante*, 513, which was argued in connection with this case, we are called upon to interpret a will without any other light as to the circumstances under which it was written than that which can be derived from an inspection of it.

The will is inartificially drawn in some respects, but keeping closely to the cardinal principle of interpretation that after all the real purpose is to get at the intention of the testator, there is not any great difficulty in coming to a decided conviction as to the meaning of the clause in question.

It is instructive to examine the general scope and framework of the whole will. After the usual introductory words the testatrix announces her intention in the following clear language: "I hereby bequeath and dispose all my estate real and personal of which I shall be entitled at the time of my decease the manner following to wit." With that intention she proceeds. She first appoints an executor, granting him certain powers as to the sale of her estate and giving him directions as to a monument to be erected to her memory. Then she gives all her property to her brother Waldo and sister Rebecca for life. Certain stocks held in trust by Waldo, apparently not regarded by her as a part of her estate but of which it may fairly be inferred she had a power of disposition by will, she gives to a nephew. She then proceeds to the consideration of what disposition shall be made of her estate after the death of Waldo and Rebecca. She divides it into two equal parts. The first half she gives to her nephew Charles Chauncey during his life, and if he dies "without heirs," then to Elihu Chauncey, another nephew, for life. If neither of them has "heirs" at his decease, then she directs that it be divided among the nieces and nephews who may be children of her brother Stephen, and finally ends as to this half in the following language: "If Charles or Elihu Chauncey have children the property is to go to them." So far the will is easily read. In sentences somewhat elliptical but clear and direct, the testatrix has created a life estate in her whole property, has divided the remainder after the life estate into two equal parts and has fully provided for the final disposition of the first part. So far she has proceeded in accordance with her intention announced when she began.

The second part remains, and she directs her mind to that. She concludes to divide it among her nephew and nieces, "children of my brothers Stephen and my eldest brother Sam." She specifically names each one of them, and directs that the property "be divided equally among them." There are six of them, five being children of Stephen, and one, Samuel, the child of her "brother Sam." Then follows the sentence over which this controversy arises: "The sum I bequeath to William Salisbury and the sum I bequeath to Sam Salisbury I wish put in trust to Elihu Chauncey & they should have the income only." And there, with the exception of two small specific bequests, and certain further directions in relation to the first half which need not be recited, she stops.

We have before us, therefore, the will of a person who started out with the purpose formally declared of disposing of the whole estate, and who proceeded with considerable minuteness of detail to create life estates and trust estates. As to the first half of her property she did make final disposition.

The clause in question is to be interpreted under this light. She wishes this second half to be equally divided among the six persons named. Each therefore takes one sixth. The part bequeathed to Samuel is put in trust, and he "should have the income only." It is contended by some of the parties to this suit that by this direction the interest bequeathed to Samuel was cut down to an equitable life estate. If this is so, then the remainder in his sixth, after the life estate, goes to the children of Stephen, excluding William, or it passes to the heirs at law of the testatrix as intestate property. In order to accept the first alternative, we must conclude that the testatrix meant to give to the four children of her brother Stephen not only four sixths absolutely, but also the remainder after the life estate in the other two sixths (the shares bequeathed to William and Samuel). It does not seem to us reasonable that if the testatrix had had in mind any such result as that she would have described the division between the six as equal. Moreover there would appear to be no reason why she should not have been as clear and specific as to the creation of remainders in this half as in the first half, if she intended to create them. Nor is the second alternative any more acceptable. It is not reasonable to

suppose that she thought she had not disposed of her whole property. She started out to dispose of the whole, and as to the first half certainly great pains are taken in that direction.

In view of the declared purpose of the testatrix to dispose of her whole property, the general framework of the will showing the manner in which she proceeded to the execution of her purpose, the clear and direct language with which she created remainders, first in her whole estate and afterwards, when it was divided into two parts, in the first of those parts, the provision that the other part should be divided equally between six persons of whom Samuel was one, the entire absence of any specific allusion to any remainder in his part or any specific disposition of any such remainder to any other person, there would seem to be every reason to believe that the testatrix intended that Samuel should take one sixth equally with the others, but that he "should have the income only," during his life, and that at his death the trust should cease and the property, then being a part of his estate, should be distributed as such. See *Fay* v. *Phipps*, 10 Met. 341. Of course such an estate both as to income and principal could be reached by creditors, and this the testatrix must be presumed to have known. As thus interpreted, there is nothing in the will with respect to Samuel's share which is inconsistent with the principles of law.

It follows that the one sixth which was held for Samuel belongs now to his estate. There should be a decree that the personal property in the trust be paid to the administrator of his estate, and that the real estate passes to his heirs at law.

So ordered.

ATTORNEY GENERAL *vs.* NETHERLANDS FIRE INSURANCE COMPANY.

Suffolk. March 17, 1902. — May 23, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Insurance, Foreign companies.

The prohibition contained in R. L. c. 118, § 20, that "no insurance company shall insure in a single risk a larger amount than one tenth of its net assets," does not apply to insurance made by a foreign company outside of this Commonwealth.

HOLMES, C. J. This is an information brought under R. L. c. 118, § 112, (see St. 1894, c. 522, § 111; R. L. c. 226, § 2,) to collect a penalty alleged to have been incurred under St. 1894, c. 522, §§ 20, 103. (R. L. c. 118, §§ 20, 103.) The defendant is a foreign insurance company incorporated under the laws of Holland and authorized to do business in this State. In California it insured "in a single risk a larger amount than one tenth of its net assets," and the question is whether the prohibition in § 20 against so doing extends to insurance by a foreign company outside the State.

In the recent case of *Johnson* v. *Mutual Ins. Co. of New York*, 180 Mass. 407, it is intimated that it is beyond the power of the Legislature to invalidate contracts made in another jurisdiction by a foreign corporation, even though that corporation has submitted itself to our laws so far as is necessary in order to enable it to do business here. The doubt as to the power was regarded as an argument for construing the statute as not making the attempt. The same argument applies here, and of course, if, for that or any other reason, § 20 is read as confined in its direct operation to Massachusetts contracts, the penalty imposed by § 103 does not apply. The statute does not purport to impose the penalty upon acts which it cannot and does not attempt to prohibit. Therefore we have not to consider the question whether it might punish what it could not prevent. See *Carnahan* v. *Western Union Telegraph Co.* 89 Ind. 526. *Commonwealth* v. *Macloon*, 101 Mass. 1.

The construction which a court naturally would be disposed to give the statute is somewhat confirmed by the history of our legislation, appealed to by both sides. The ten per cent limit upon risks after having been applied to domestic companies, St. 1817, c. 120, § 7; Rev. Sts. c. 37, § 21, was next applied to foreign companies in a different way by making it unlawful to act or contract as agent in this State for such companies unless they were restricted in like manner by their charters or otherwise. St. 1826, c. 141, § 3. Rev. Sts. c. 37, § 42. This went on through St. 1854, c. 453, § 31; St. 1856, c. 252, § 44; Gen. Sts. c. 58, § 66; Pub. Sts. c. 119, § 197; and there was added a specific prohibition of making contracts in this Commonwealth by which a risk of more than ten per cent of the capital or the securities specified was incurred. St. 1870, c. 349, § 1. Pub. Sts. c. 119, § 224. These local provisions stood alongside of the seemingly universal limitation set upon domestic companies. Pub. Sts. c. 119, § 56.

The trouble is due to an attempt at condensation in the codification of 1887. There, under the head of "Provisions common to all companies," after forbidding any company authorized to do business in this Commonwealth to reinsure its Massachusetts risks with any company not so authorized, it goes on: "And no such company shall insure in a single hazard a larger sum than one tenth of its net assets." St. 1887, c. 214, § 20. This obviously was intended, as is indicated by the margin of the section, to consolidate the sections concerning domestic and foreign insurance companies in the Public Statutes. Pub. Sts. c. 119, §§ 56, 197. See § 224. The act of 1887 was a continuation of existing laws, so far as it was the same, § 112, and it is plain that with regard to the question before us no alteration was intended. But it is plain also that without a good deal of straining it must be construed either as narrower than the possible meaning of § 56 for domestic companies or broader than the expressed intent of §§ 197 and 224 for foreign. It is enough to say that we think the latter horn of the dilemma cannot be accepted as we feel confident that it was not meant. The later statutes seem to require little additional comment. St. 1891, c. 368. St. 1894, c. 137, § 1; c. 522, § 20. St. 1895, c. 59, § 1. R. L. c. 118, § 20. The general intent of continuity is expressed

in St. 1894, c. 522, § 112; R. L. c. 226, § 2. In St. 1894, c. 137, § 1, one of the re-enactments of St. 1887, c. 214, § 20, the part dealing with reinsurance of risks omits the limitation to Massachusetts risks. But the words with which we are concerned, so far as material, are the same as in 1887, and have not changed their meaning.

It is obvious that the Massachusetts insurer has comparatively little concern with the extent of risks taken elsewhere, because apart from precautions taken by the statute to which we need not advert, a disaster to an insurance company which did not embrace the destruction of the insurer's property would mean at most a loss of premiums and the necessity of insuring elsewhere. But a disaster in Massachusetts would be likely to mean the destruction of property of other insurers beside the one who made the insurance exceeding ten per cent, and a chance of losing their insurance.

The defendant at once reinsured in companies authorized to do business in Massachusetts to an amount which, if deducted from the total risk, would reduce the defendant's remaining risk within the statutory limit. It is argued with some plausibility that this fact would save the defendant if the statute applied to its case. St. 1894, c. 522, § 20. But as the statute does not apply we leave this question undecided.

Information dismissed.

F. H. Nash, Assistant Attorney General, for the plaintiff.

R. F. Herrick & A. M. Lyon, for the defendant.

HORACE C. NICHOLS *vs.* DAVID ROSENFELD.
MEREDITH W. PALMER & another *vs.* SAME.

Suffolk. March 18, 1902. — May 23, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Equity Jurisdiction. Agency. Evidence, Conversations between husband and wife. *Deed*, Delivery. *Alteration of Instruments.*

Semble, that one seeking equitable relief on a charge of fraud must maintain his case on that ground or lose it.

Testimony by a wife that her husband acted by her authority is not necessarily made incompetent by her statement that her conversations with him were private.

Where a loan is to be made upon a mortgage, and a time is appointed for passing the papers, and the mortgage and note are handed to the mortgagee's lawyer and remain in his custody for a day before the time fixed for passing the papers, there is no delivery in the technical sense until that time arrives, and an alteration in the mortgage note made before the papers are passed is made before delivery.

HOLMES, C. J. These are two bills in equity seeking to set aside a mortgage on the ground that the mortgage note was altered fraudulently after delivery. The cases come before us on frivolous bills of exceptions concerning which perhaps it would be enough to say that in this court a charge of fraud is regarded as something more serious than a rhetorical embellishment, that if a man puts his case on that ground he must maintain it on that ground or lose it, and that the plaintiff's own evidence made it abundantly clear that if there was any fraud it was not on the defendant's side. But we will deal with the exceptions so far as they seem to present any question.

The case presents an attempt by the plaintiffs to take advantage of a slip in the original writing of the mortgage note by which the interest was made two per cent per annum instead of two per cent per month. The mortgagor was a Mrs. Jeffrey, and she and her husband signed the mortgage note. Her husband conducted the transaction, and one Perkins acted for him

and for her. Jeffrey and Perkins both understood the rate of interest to be two per cent a month. Before passing the papers the defendant's lawyer discovered the mistake in the note, called Jeffrey's attention to it and corrected it with his consent. The papers then were passed, and the defendant advanced his money, which there has been no offer to return. The mode in which the plaintiffs sought to accomplish their effort was by excluding evidence of authority from Mrs. Jeffrey to make the alteration. After she had testified that her husband conducted all the negotiations for her and had all authority, she was asked by the plaintiffs' lawyer whether she had given any authority in writing, to which she replied that he did as he liked, she had nothing to say about it. In answer to a further question she said that she was alone with her husband when she talked the matter over. A motion then was made that the evidence as to her husband's acting for her be ruled out, and other exceptions were taken upon the same principle, which was of course that it sufficiently appeared that the husband's authority was given only in private conversation. *Brown* v. *Wood*, 121 Mass. 137. *Commonwealth* v. *Hayes*, 145 Mass. 289, 293. *Commonwealth* v. *Cleary*, 152 Mass. 491. But such is not the fact. Such a conversation is not necessarily private. There is no presumption one way or the other. The judge may have disbelieved Mrs. Jeffrey's statement. But if he believed it fully, her account implied a course of overt acts which was not private, and further an assumption by her husband assented to by her without words that he was to manage the whole affair. See *Anderson* v. *Ames*, 151 Mass. 11; *Jefferds* v. *Alvard*, 151 Mass. 94; *Dyer* v. *Swift*, 154 Mass. 159, 162; *Beston* v. *Amadon*, 172 Mass. 84. Furthermore, as we have remarked, she accepted the money upon the contract as it now stands, and so far as appears still has it.

The evidence of the authority of Perkins was indisputable when that of Mr. Jeffrey was established. Indeed there was evidence from Jeffrey not objected to that Perkins acted for him and his wife.

Not only was the judge warranted in finding as he did that the note was changed before delivery with the consent of the mortgagor's agent and therefore that there had been

no alteration of the note, but it would have been impossible to come to any other conclusion. In view of this finding, rulings as to the effect of alteration properly were refused. We think it unnecessary to say more, or indeed so much as we have said to justify the refusal of rulings that the plaintiffs were entitled to recover or that in case of redemption the defendant was entitled only to two per cent a year. But we may mention that if, as would seem from the defendant's lawyer's testimony, the mortgage and note were in his custody for a day before the time appointed for passing the papers, it would be found, as a matter of course, that he did not hold them as operative instruments, or in the defendant's name. See *People's National Bank* v. *Freeman's National Bank*, 169 Mass. 129, 133; *Shurtleff* v. *Francis*, 118 Mass. 154; *Brackett* v. *Barney*, 28 N. Y. 333; *Ford* v. *James*, 2 Abb. App. 159; *Curry* v. *Colburn*, 99 Wis. 319; *Watkins* v. *Nash*, L. R. 20 Eq. 262. This is not a case of an attempted delivery in escrow to the defendant's attorney followed by a transfer to a bona fide purchaser, like *Hubbard* v. *Greeley*, 84 Maine, 340. There was no delivery in the technical sense until the time fixed for passing the papers.

The bill which was dismissed was dismissed rightly.

Exceptions overruled; bill dismissed.

J. B. Dixon, for the plaintiffs.

L. L. G. DeRochemont, (*J. F. Libby* with him,) for the defendant.

THOMAS J. COMERFORD *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Norfolk. March 20, 1902. — May 23, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Negligence, Contributory, On railroad. *Practice, Civil*, Exception. *Evidence.*

If a conductor starts a train while passengers are still alighting at a station, and then perceiving the situation causes the train to be stopped suddenly, one thrown from the steps of a car by the jar in stopping may be found to be in the exercise of due care, and the railroad company may be found to be negligent in suddenly stopping the train under such circumstances without any warning.

Where a witness for the plaintiff in an action for personal injuries against a railroad company, has testified on cross-examination that he signed a certain statement in writing concerning the accident shortly after the accident, and then admits orally the entire contents of the paper as read to him by the defendant's counsel, the exclusion of the paper itself, offered to contradict the witness's previous testimony, is no ground for exception, as the defendant is not harmed by it.

In an action against a railroad company for negligence in stopping a train suddenly, after starting it without noticing that passengers were still alighting, the number of persons at work on the train properly may be considered by the jury upon the question whether sufficient care was exercised to ascertain the condition of things when the order to stop was given.

TORT by a passenger for injuries caused by the alleged negligence of the defendant whereby the plaintiff was thrown from the step of one of its cars. Writ dated June 22, 1900.

At the trial in the Superior Court *Bell*, J. refused to rule, at the request of the defendant, that on all the evidence the plaintiff was not entitled to recover. This was the request mentioned by the court as the first, the exceptions to the refusal to give five others having been waived. The statement in writing of the witness Bryant described by the court was offered in evidence for the purpose of contradicting his previous testimony. Bryant was a witness for the plaintiff and the paper was offered and excluded upon his cross-examination.

The jury returned a verdict for the plaintiff in the sum of $4,000, of which the plaintiff on requirement of the judge afterwards remitted $1,000. The defendant alleged exceptions.

C. F. Choate, Jr., for the defendant.

J. A. Halloran, for the plaintiff.

HAMMOND, J. Upon the evidence in this case, the jury would be warranted in finding that, while the train was stopping at a regular station for the discharge of passengers, some of them, seated in the only ordinary general passenger car of the train, desiring to alight, passed out upon the front platform of the car, and seeing that the right hand gate — which was the one leading to the station platform — was closed and that the left hand gate was open, proceeded to pass out by the latter and in that way alighted from the car; that, while this was going on and while the plaintiff and others who desired to alight were yet upon the platform and steps, the conductor of the train, seemingly unaware of this action on the part of the passengers and supposing that all who desired had left the train, caused it to be started; that immediately afterwards he saw that several had not left the train who apparently intended to do so, and caused the train to be stopped; and that (although upon this a finding the other way might reasonably have been expected) the plaintiff, being then upon the steps of the car, was thrown to the ground by the jar in stopping. They further might properly have found that the conductor should have known what was going on, and that in consideration of the high degree of care required of common carriers towards their passengers, the sudden stopping of the car without any warning was under the circumstances a negligent act, and that it contributed to the injury.

It is true there is much to be said in support of the theory that the plaintiff was not thrown from the car at all, that he supposed the car was at a stop and hence voluntarily stepped from it, and this view of the evidence may seem to be the more reasonable, but we cannot say that the jury were bound to take that view of the occurrence.

Upon the question of due care of the plaintiff the case was properly left to the jury. It follows that the first request was properly refused. We understand that the exceptions to the refusal to give the other requests in the form presented are waived.

We do not see how the defendant was harmed by the exclu-

sion of the written statement made by the witness Bryant. The language in the statement which the defendant desired to have introduced to the jury was as follows: "The train had gone about two car lengths, and was going as fast as a man could run when Mr. Comerford attempted to get off. I would not want to swing off when the car was going as fast as it was when Mr. Comerford attempted to do so." After the witness had looked at the paper and said that the signature to it was his, and that the statement was made shortly after the accident, and was correct, he was further examined as to its contents as follows:

"*Q.* You said the train had gone about two car lengths, and was going as fast as a man could run, when Mr. Comerford attempted to get off, did n't you? *A.* Yes."

"*Q.* Did n't you then say, Mr. Bryant, this: 'I would not want to swing off when the car was going as fast as it was when Mr. Comerford attempted to do so'? *A.* I said so at that time, yes."

With the paper in his hands the counsel thus was allowed to show its precise language by the answer of the witness, and no one contended that the witness did not use the language in the paper. The jury had therefore the fact that the paper contained those statements made in writing by the witness, and they knew the exact language. The exclusion of the paper under these circumstances could work no injury.

As to the absence of brakemen, the jury were instructed that if the absence of the statutory number of brakemen "had nothing to do with the accident, that is all out of the case," but "if the lack of those brakemen in any way helped on this accident, then that is one of the things you may consider in determining whether this railroad was negligent in what took place there." The defendant contends that the effect of this was to give the jury the right to find for the plaintiff upon a new substantive ground of liability on the part of the defendant, namely, the non-observance of a statutory requirement. We do not so understand it. The jury were distinctly told that the plaintiff must prove his case as set out in his declaration, or in other words that he was thrown from the car by a negligent starting or negligent checking of the train. The number of persons at work on the train, whether brakemen or not, might properly be

considered by the jury upon the question whether proper care was exercised to ascertain the condition of things at the time the order to stop was given, and we do not see that the court went further than that.

Exceptions overruled.

NASHUA SAVINGS BANK *vs.* JOHN E. ABBOTT, administrator.

Suffolk. March 21, 1902. — May 23, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Stock Exchange. Assignment. Contract, Construction. *Equity Jurisdiction.*

A seat in the Boston stock exchange, which can be transferred under certain restrictions and on the member's death can be sold by a committee and the balance of the proceeds given to the legal representatives of the deceased, is property on which a lien can be enforced in equity.

An assignment to a bank of certain property, executed by W. and his wife, to secure their joint and several note for $4,500 contained the words "This assignment is voluntary on our part and shall remain in full force until all the indebtedness of said W. to the said bank shall have been paid." Later the note was renewed by a like joint and several note for $5,000 including another loan of $500, and upon the new note was a statement that it was secured by the property assigned. Between the making of the original note and the renewal W. borrowed an additional $2,800 from the same bank, giving his personal note with the indorsement of a third person. After a part payment on this note, a like note for $2,000 similarly indorsed was given for the balance due. Neither of the last named notes mentioned the assignment. *Held,* that by the language used in the assignment it was not intended to give the bank a lien for all possible future indebtedness, and that the note for $2,000 was not entitled to share in the security of the assignment.

Where a seat in the Boston stock exchange was assigned to a bank by a member to secure his note, and after his death the seat was sold under the rules of the exchange and the balance of the proceeds paid to the administrator of his estate, notice of the assignment having been given by the bank both to the exchange and the administrator, it was *held,* that the bank's lien could be enforced by a suit in equity against the administrator who held the proceeds of the sale subject to the lien, and, having in his hands more than enough to discharge it, he could be ordered to pay the required sum to the plaintiff.

One having a lien on certain property of a person deceased insolvent created by an assignment securing a note of the deceased, does not lose his lien by failing to sue on the note or to prove it before the commissioners within the two years fixed by the special statute of limitations, or by an attempt afterwards abandoned to enforce his claim on the note in equity under Pub. Sts. c. 186, § 10. Neither the debt nor the lien are affected by these things, and, if the assignee has been

guilty of no laches in insisting on his lien, he can enforce it in equity against the property, or against its proceeds in the hands of one holding them with notice of the lien.

BILL IN EQUITY, filed November 22, 1900, against the administrator of the estate of Allen S. Weeks, to have the proceeds from the sale of a seat or membership in the Boston Stock Exchange declared charged with an express trust or lien by reason of a certain assignment in writing dated October 6, 1883, securing the payment, as alleged, of two promissory notes, one for $5,000 signed by Allen S. Weeks and Lucy N. Weeks, and the other for $2,000 signed by Allen S. Weeks as maker and Henry Sayles as indorser.

The case was heard by *Morton*, J., who made certain findings, and, at the request of the parties, reported the whole case for the consideration of the full court. If, upon the law and facts, the plaintiff was entitled to recover upon the first note mentioned, a decree was to be entered for the plaintiff in the sum of $4,654.26, with interest from January 23, 1899. If, upon the law and facts, the plaintiff was entitled to recover on the second note, a decree also was to be entered thereupon for the plaintiff in the additional sum of $2,000, with interest from November 30, 1896. If the plaintiff was not entitled to recover upon either note, a decree was to be entered of "Bill dismissed."

By the terms of the report the bill and answer might be referred to and also the record in *Powow River National Bank* v. *Abbott*, 179 Mass. 336.

The justice, after making a statement of the facts of the case, concluded his report as follows: "Upon so much of the foregoing statement as relates to what took place before the commissioners, I found and ruled, subject to the defendant's exception, that the plaintiff bank had not waived its security, if it had any."

The assignment was as follows:

"Boston, October 6, 1883. For value received, we hereby assign to the Nashua Savings Bank, and relinquish and make over to said Bank, all our right, title and interest, in the membership and seat in the Boston Stock Exchange held by Allen S. Weeks. This assignment is voluntary on our part and shall remain in full force until all indebtedness of said Allen S. Weeks

to said Bank shall have been paid. Allen S. Weeks, Lucy N. Weeks."

The first mentioned note was as follows:

"Brookline, Mass., Nov. 1, 1894. $5,000. On demand, for value received, we jointly and severally promise to pay the Nashua Savings Bank, five thousand dollars with interest at the rate of six (6) per cent per annum, payable semi-annually. Allen S. Weeks, Lucy N. Weeks."

"Collateral Security. One membership (or seat) of the Boston Stock Exchange."

There were several indorsements of interest received, and an indorsement, dated January 23, 1899, of the payment of $1,010.74 on account of the principal of the note.

The second mentioned note was as follows:

"Boston, May 31, 1890. No. ——. $2,000. On demand, for value received, six months after date, I promise to pay the Nashua Savings Bank, or order, two thousand dollars, at the office of said Bank, in Nashua, N. H., with interest from date at the rate of six (6) per cent, payable semi-annually in advance. Allen S. Weeks."

There were indorsed on the note semi-annual payments of interest up to April, 1897, and the signature of Henry Sayles as indorser.

The following are extracts from the Constitution of the Boston Stock Exchange:

"Article X. Election to Membership. Section 1. The election of members shall be made by ballot, and no person shall be eligible who is not twenty-one years of age at the time of his application for admission. The applicant for admission must be proposed by at least two members of the Exchange to the Governing Committee, who shall report thereon before the day of election. The name of the applicant, and of the parties proposing him, shall be posted in the Exchange from the day he is proposed to the Committee until the day of the election. The name of the candidate must be proposed at least ten days preceding the election, and fifteen black balls shall exclude. In the event of non-admission, a new election for the same candidate shall not be held within thirty days of the last ballot, nor be acted upon until ten days from the date of application."

"Article XII. Transfer of Membership. Section 2. Whenever any member wishes to transfer his membership, the name of the party to whom he proposes to transfer shall be submitted to the Governing Committee, and his election shall be made by ballot as provided in Article X.

"Section 3. In no case shall any transfer of membership be permitted until all dues to the Stock Exchange shall have been paid in full, said dues being hereby declared a prior lien upon the proceeds, to be satisfied in full before any distribution thereof shall be made.

"Section 4. When a member dies, the Governing Committee may dispose of his membership. From the proceeds they shall pay what they consider valid claims of the members of the Exchange, and shall pay any balance to the legal representatives of the deceased."

"Section 6. All contracts, debts, or obligations of every description, with or to members of the Exchange, of a member who agrees to transfer his membership, shall become due and payable when notice of said agreement to transfer is posted upon the Bulletin of the Exchange, and shall be liquidated and paid, as allowed by the Governing Committee, out of the proceeds of said membership, upon consummation of the transfer thereof. This law shall also apply in every case where a membership is transferred by the Governing Committee."

"Article XIV. Obligation to Abide by the Constitution. The Constitution and By-Laws of the Exchange shall be recorded in a book to be provided therefor, and each and every member of the Exchange, together with all who may at any time hereafter be admitted, shall sign the same, thereby pledging themselves to be governed by said Constitution and By-Laws, and by such other rules and regulations as may from time to time be adopted by the Exchange."

"Article XVII. Gratuity Fund. Upon the death of any member of the Exchange, there shall be levied and assessed against each surviving member the sum of twenty dollars ($20), and the sum of three thousand dollars ($3,000) shall be paid, as a gratuity to the representatives of the deceased, on the conditions as follows:

"First. — Should the member die leaving a widow and no

children, the sum of three thousand dollars ($3,000) shall be paid to such widow for her own use."

"Fourth. — Should the member die leaving neither widow or children, then the whole sum of three thousand dollars ($3,000) shall be paid to such person or persons as he may especially designate, and in case of his decease without any especial designation, it shall be paid to his heirs-at-law.

"Fifth. — Nothing herein contained shall ever be taken or construed as a joint liability of the Exchange, or its members, for the payment of any sum whatever, beyond the pro rata assessment levied upon each member, as heretofore stated; it being distinctly understood that the amount paid is a gratuity."

A. S. Hall, for the plaintiff.

G. A. A. Pevey, *E. B. Gibbs* & *H. K. Brown*, for the defendant.

BARKER, J. The right to a seat in the exchange had a pecuniary value, could be transferred under restrictions, and upon the member's death could be disposed of by a committee by sale, the price after extinguishing the claims of other members going to the legal representatives of the deceased. These characteristics make such rights property, and they are so recognized and dealt with. *Fish* v. *Fiske*, 154 Mass. 302. *Currier* v. *Studley*, 159 Mass. 17. See *Hyde* v. *Woods*, 94 U. S. 523; *Powell* v. *Waldron*, 89 N. Y. 328; *People* v. *Feitner*, 167 N. Y. 1; *Barclay* v. *Smith*, 107 Ill. 349.

The assignment of October 6, 1883, was in terms a pledge of this property to the plaintiff, and being upon a valuable consideration gave the plaintiff a lien. As the property was not susceptible of delivery the instrument need not be recorded, *Marsh* v. *Woodbury*, 1 Met. 436, and the lien could be enforced without a foreclosure as of a mortgage of personalty. *Taft* v. *Church*, 162 Mass. 527, 532. *McKie* v. *Gregory*, 175 Mass. 505. See also *Richardson* v. *White*, 167 Mass. 58.

We are of opinion that it was not intended to give the plaintiff a lien for all possible future indebtedness. We do not give that meaning to the words "This assignment . . . shall remain in full force until all indebtedness of said Allen S. Weeks to said Bank shall have been paid." When delivered it was security for the payment of a loan of $4,500 then made. On November

1, 1894, this loan being unpaid and the assignment still in the possession of the plaintiff, a note of that date for $5,000 was given in renewal of the $4,500 loan and of another loan of $500, and upon that note, which was a joint and several note of both of the makers of the assignment and signed by both was this written statement: "Collateral Security. One membership (or seat) of the Boston Stock Exchange." The intention was to continue the lien for the payment of this $5,000 note, and the writing was sufficient for that purpose.

The note of $2,000 was dated May 31, 1890, and was in renewal of part of a note of $2,300 dated December 1, 1884. Neither of these notes mentioned the assignment of October 6, 1883, and there is no writing signed by Weeks which makes it clear that the parties intended the lien to apply to either of these notes. We are of opinion that the $2,000 never has been secured by the lien.

This lien for the debt represented by the $5,000 note was in force on August 8, 1897, when the defendant's intestate died. Administration upon his estate was granted August 19, 1897. Thereafter the assignment was presented both to the officers of the exchange and to the defendant, and the claim was made that the plaintiff was entitled under it to be secured for its indebtedness. The seat was sold with notice of this claim and a large sum was paid over by the exchange to the defendant, who took it with like notice. This change of the property into money, in accordance with rights existing when the lien was created, was like the conversion of mortgaged land into money by a foreclosure sale and the lien subsisted and held the proceeds of the sale. *Western Union Telegraph Co.* v. *Caldwell*, 141 Mass. 489, 492, 493.

As the defendant received the money with notice of the lien and has of it in his hands more than enough to extinguish the debt for which the lien is security, the plaintiff is entitled to a decree unless the lien has been extinguished or the plaintiff's right to its enforcement lost since November 7, 1897, when the money was paid to the defendant.

One contention is that this suit is barred by the short statute of limitations. That statute applies to actions by a creditor of the deceased. Pub. Sts. c. 136, § 9. R. L. c. 141, § 9. The

right of the plaintiff to bring suit upon the note or to prove it as a debt of the defendant's intestate before the commissioners appointed when the defendant represented that estate insolvent is barred by the statutes cited. But the debt and the lien both exist, and this suit is not an action by a creditor to collect his debt, but a suit by an equitable owner to enforce his title. If the money had been received by the defendant's intestate, as in *Western Union Telegraph Co.* v. *Caldwell*, *ubi supra*, the short statute of limitations would have applied. It was not so received, but was paid to the defendant after his appointment and with notice of the lien. By mingling with the funds of his intestate's estate money to which the plaintiff had an equitable title and which the defendant took with notice of that title, the defendant could neither divest that title nor gain the right to a defence which protects him from the suits of creditors of his intestate. The statute does not protect an administrator in converting to the use of the estate of his intestate the property of another, and is no defence to him against an action to enforce the equitable ownership of another in money which the administrator has received from a sale by the committee of the right of his intestate to a seat in the board, and which the administrator took charged with a lien and having notice of the lien. See *Thayer* v. *Mann*, 19 Pick. 535; *Cunningham* v. *Davis*, 175 Mass. 213, 221.

Nor has the plaintiff lost its right to enforce its lien by laches. The record shows that it gave prompt notice to the defendant both of its debt and of its claim of this lien as security. While no action was brought within the two years during that period the plaintiff was insisting upon its debt. Upon the appointment of commissioners an effort was made to prove the debt before them, and thereafter the plaintiff attempted to collect it by a suit in equity. The only ground for contending that the plaintiff has been guilty of laches is the fact that in *Powow River National Bank* v. *Abbott*, 179 Mass. 336, certain creditors who like the plaintiff relying on the defendant's representations did not sue him within two years have been adjudged to have been chargeable with culpable neglect within the meaning of Pub. Sts. c. 136, § 10. But although originally joined as a plaintiff in that suit this plaintiff had ceased to be a party to it before

the judgment. Nor will the circumstances which bar a recovery under that statute, necessarily support a plea of laches in other proceedings in equity, not brought by creditors of the estate as creditors, but brought like the present suit by an equitable owner of property to enforce his ownership. The question must we think be decided with reference to the usual rules governing the defence of laches, and this defence is not sustained.

There is a finding in the report that as to what took place before the commissioners the plaintiff had not waived its security. We are of opinion that the plaintiff has not lost or waived its right to enforce its lien either by what took place before the commissioners or by its course in joining in the bill in equity under Pub. Sts. c. 136, § 10, brought after the disallowance of its claims by the commissioners. Neither the defendant nor any creditor of the estate other than the plaintiff has been prejudiced by the action of the plaintiff in either of those matters. The whole claim of the plaintiff was disallowed, and it has neither received or been adjudged entitled to receive any payment out of the estate. The oral assent of the plaintiff to the defendant's statement to the commissioners that he considered the assignment ineffectual and would not recognize it and that the plaintiff had been so advised by the secretary of the exchange, was made in good faith and has harmed no one. An unsuccessful attempt to prove as unsecured a secured claim, in the absence of any written waiver, ought not to extinguish the security, no one having been harmed by the attempt.

The defendant's contention founded on the equity jurisdiction of the Probate Court is unsound. The probate and the equity jurisdictions of that court are distinct and its equity jurisdiction is a concurrent one only. Resorting to the probate jurisdiction to prove a claim against the estate of a deceased person, is not an election to choose the equity side of the same court to enforce an equitable ownership to money in the hands of the administrator of the estate against which the claim is offered.

The remaining contention is founded upon the release of the joint makers of the note, and the plaintiff's assent to the disposition of the $5,000 gratuity a part of which only was applied to the note. The gratuity under the rules of the exchange was not a right, but merely a gift from the other members to the widow

of the deceased member. Whether or not the defendant could complain of the release of a co-maker who was as to his intestate only a surety if there had been no reservation in the release, there was such a reservation of the plaintiff's rights as against all others. *Sohier* v. *Loring*, 6 Cush. 537. *Kenworthy* v. *Sawyer*, 125 Mass. 28. *Beacon Trust Co.* v. *Robbins*, 173 Mass. 261, 271.

Decree for plaintiff in the sum of $4,654.26, with interest from January 23, 1899, and for costs.

THOMAS F. McGEARY *vs.* JAMES McGEARY.

Essex. March 21, 1902. — May 23, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Guardian. Interest.

A father who is the guardian of his minor child, and who is not of sufficient pecuniary ability to support the child suitably, should be allowed a reasonable charge for the support of the child in the settlement of his account as guardian. Whether the father intended to charge the son for his support and whether the circumstances of both justified such charges are questions of fact which on appeal will be presumed to have been decided rightly, unless facts appear which clearly show the contrary.

Where a guardian was held to be chargeable with money of his ward lent and lost, the ward asked that the guardian should be charged with compound interest on the sums so lost. *Held*, that, although a guardian is chargeable with interest which he should have collected, no change in the amount allowed as interest would be made in a case where, upon the agreed facts, it did not appear that the allowance made was not a proper adjustment of all matters of interest which should have entered into the account.

APPEAL from a decree of the Probate Court of the County of Essex upon the allowance of the account of a guardian.

The case was heard on appeal by a single justice of this court. It appeared, that by the guardian's account he charged himself with deposits of $2,000 in two savings banks and the interest of $1,208.98 paid by those banks, making a total of $3,208.98. He credited himself with $2,452 for board, clothes and education, leaving a balance at the ward's majority of $756.98.

It appeared, that the guardian had drawn from the banks

$1,425, of which $1,000 was lent and lost, its collection being barred by the statute of limitations. The guardian was a currier by trade, paid by the week when he could get work. The ward was his son, who when about four years old lost a foot by a railroad accident, for which he received the $2,000 that created the fund.

The Probate Court had made a decree, that the guardian be charged with $48, as interest on an uninvested balance in his hands for several years, that the item of $1,092 for seven years' board be allowed for $710 only, and that the account so changed be allowed, leaving the accountant charged with a balance of $1,178.98. The ward appealed.

The single justice made a decree, that the decree of the Probate Court be amended by crediting the appellant with the sum of $63.50 for money earned by him and paid to the appellee during the guardianship, that the decree thus amended be affirmed, and the case be remanded to the Probate Court for further proceedings. The ward appealed.

G. H. Smart, for the appellant.

F. E. Farnham, for the appellee.

BARKER, J. A father who is guardian of his minor child should be allowed for the support of the latter in settlement of his guardian's account if the father was not of sufficient ability pecuniarily to support the child in the way in which he should be brought up. *Dawes* v. *Howard*, 4 Mass. 97. *Strong* v. *Moe*, 8 Allen, 125. See also *Melanefy* v. *O'Driscoll*, 164 Mass. 422. Whether such an allowance should be made in the present case was a question of fact a finding upon which in favor of the accountant is implied in the decision appealed from. That decision will not be changed here unless clearly shown to have been erroneous. It does not appear that the father kept no accounts with the son. Whether the father intended to charge the son for his support and whether the circumstances of both justified such charges are questions as to which the record does not give us sufficient light to determine that the decision in favor of the guardian was wrong.

The account as settled by the decree appealed from in effect charges the guardian with the amount of the ward's property lent and so lost. The appellant now contends that the guardian

should be charged with compound interest on the amount of the sum so lent and lost. There is no doubt that a guardian is chargeable with interest which he should have collected. *Forbes* v. *Ware*, 172 Mass. 306. But it does not appear from the agreed facts but that the allowance made for interest was a proper adjustment of all matters of interest which should have entered into the account.

Decree affirmed.

JACOB WIRTH & another *vs.* HENRY R. WIRTH.

Suffolk. March 24, 1902. — May 23, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Appeal, Moot question.

Where a petitioner appealed from a decree of the Probate Court, ordering him to file specifications on a certain matter alleged in his petition, and, after taking the appeal, filed the specifications required, this court, to which the case had come by an appeal from the decree of a single justice, refused to pass upon the question raised by the appeal as being a moot question, and ordered that the appeal to the full court be dismissed and the case remitted to the single justice, with directions to enter a decree dismissing the appeal from the decree of the Probate Court and to remit the case to that court for further proceedings.

PETITION, filed June 21, 1901, in the Probate Court for the County of Suffolk for the removal of Henry K. Wirth as administrator with the will annexed of the estate of Jacob Wirth.

The respondent demurred to the petition. In the Probate Court *McKim*, J. made the following decree: "Demurrer sustained, but the petitioners may file specifications upon the allegations affecting the conduct of the administrator since his appointment." The petitioners appealed.

On appeal, the case was heard by *Barker*, J., who made a decree reversing so much of the decree of the Probate Court as sustained the demurrer, affirming so much of that decree as allowed the petitioners to file specifications, and ordering that the case be remanded to the Probate Court for further proceedings. From this decree the respondent appealed.

It was admitted, at the argument, that after the appeal from the decree of the Probate Court was taken the petitioners filed

specifications in that court, to which the respondent demurred as insufficient.

J. A. Halloran, for the petitioners.

G. W. Anderson, for the respondent.

HAMMOND, J. It may be assumed that the decree of the Probate Court of September 27, 1901, required the petitioners to file specifications within a reasonable time and therefore was subject to appeal. We do not however find it necessary to decide the various questions argued before us, because we think that this appeal should be dismissed for reasons not affecting the merits of the controversy.

At the hearing before us it appeared that since making their appeal the petitioners have filed in the Probate Court specifications in accordance with the decree from which they appealed. This they had a right to do; but, having done so, the order is no longer a grievance, and to pass upon it is to pass upon a moot question. Under these circumstances the appeal to the full court should be dismissed and the case remitted to the Supreme Judicial Court for the County of Suffolk, with directions to enter a decree dismissing the appeal from the decree of the Probate Court and to remit the case to that court for further proceedings.

So ordered.

ANNIE BENJAMIN & others *vs.* JAMES D. CASEY & another.

Suffolk. March 31, 1902. — May 23, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Exceptions.

The denial of leave to amend at the last moment is not a ground for exception, being a matter of discretion.

PETITION, filed March 28, 1902, to establish exceptions.

The proceedings related to a bill, filed August 21, 1901, to redeem from a mortgage certain land in Brookline. It was alleged in the petition to establish exceptions, that on December 24, 1901, the case was heard on its merits by *Barker*, J., who gave the original plaintiffs, Benjamin and Jennings, until January 20,

1902, at 12 M. to redeem. On January 17, 1902, the First National Bank of Yarmouth was allowed by the court to become a party and was given until February 19, 1902, at 12 M. to redeem. At 9.30 A. M. on February 19, 1902, Benjamin, Jennings and the First National Bank of Yarmouth asked the court to be allowed to amend the bill. The motion was denied by *Morton*, J.

The exceptions were disallowed by *Morton*, J. as follows: "I do not think that the matter is one to which an exception lies and I therefore disallow the exceptions. If the matter is one to which an exception lies by the parties, or either of them, then the bill is in proper shape in form and substance and should be allowed."

E. H. Savary, for the petitioners.

I. R. Clark, for the respondents.

BY THE COURT. The allowance of the amendment was a matter of discretion. Nothing appears except that leave to amend was asked at the last moment and was denied. This is not ground for exception.

Petition dismissed.

PATRICK J. DALY & another *vs.* DANIEL L. DEMMON.

Suffolk. April 2, 1902. — May 23, 1902.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

Evidence, Materiality. *Practice, Civil*, Exception.

In an action by a tenant against his landlord for breach of an alleged agreement to make repairs in a building, a building inspector, called as a witness by the plaintiff, was asked to state, what was the condition as to protection for tenants in the building, and what if anything was required, and, after objection by the defendant, answered "One purpose would require one provision, another purpose would require another." *Held*, that the question was proper, the condition of the premises being material on the question of damages, if for no other reason, and, that the answer obviously was intended as a preliminary statement and in no way could have prejudiced the defendant.

CONTRACT by tenants against their landlord for an alleged breach of an oral agreement to make certain repairs upon the premises. Writ dated June 14, 1901.

At the trial in the Superior Court before *Hardy*, J., the jury returned a verdict for the plaintiffs in the sum of $1,500; and the defendant alleged exceptions.

The ruling requested at the close of the case referred to by the court, and held to have been given in substance, was as follows: "If there was no specific agreement between the parties entered into for specific inside repairs at the time the leasing or contract of lease was made, the presumption of law is that the plaintiffs took the premises in the condition in which they then were."

J. T. Wilson, for the defendant.

I. R. Clark, for the plaintiffs.

HAMMOND, J. This is an action to recover damages for the breach of an alleged express agreement to put in ordinary tenantable repair, so that the same could be used for light manufacturing purposes, certain real estate let by the defendant to the plaintiffs. There was conflicting evidence as to whether such an agreement was made.

1. As to the ruling requested at the close of the case, it is sufficient to say that, although it was not given in the terms requested, it was given in substance. The jury were expressly told that, in order to recover, the plaintiffs must prove by a fair preponderance of the evidence the express contract upon which they relied; and that in the absence of an express contract there is no liability upon a landlord to make repairs or to put a tenement in a proper condition for occupancy. The judge even explained the rule by an apt illustration. Upon this point the charge was clear, accurate, and unusually full.

2. One Shaw, called by the plaintiffs, after stating that in the performance of his duties as a building inspector in the city of Boston he visited the tenement for the purpose of seeing whether it was occupied, and if so, whether the occupants needed any protection, was asked to state what was the condition as to protection for tenants in the building, and what, if anything, was required, and answered finally that "one purpose would require one provision, another purpose would require another." To this question and answer the defendant excepted.

The question was certainly proper. The condition of the premises for any purpose was material on the question of dam-

ages, if for no other reason. Between the time the question was first put and the time of the answer, a colloquy as to its admission took place between the counsel and the judge, by which the attention of the witnesses apparently was somewhat distracted, and so the answer was not very direct. It is plain that it was intended simply as a preliminary statement, and one cannot conceive how it could in any way have been prejudicial to the defendant.

Exceptions overruled.

COMMONWEALTH *vs.* JOHN C. BEST.

Essex. May 19, 1902. — June 3, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & LORING, JJ.

Practice, Criminal, New trial, Exceptions.

The refusal of the judges who presided at a murder trial to grant a new trial, asked for on the ground that one of the jurors was deaf, the judges stating that they are satisfied that the juror heard substantially all the evidence, is not the subject of an exception and should not be brought before this court.

INDICTMENT for the murder of one George E. Bailey, returned January 25, 1901.

The decision of the court overruling the exceptions in this case is reported in 180 Mass. 492.

N. D. A. Clarke, (*J. H. Sisk* with him,) for the defendant.

W. S. Peters, District Attorney, for the Commonwealth.

HOLMES, C. J. After the exceptions in this case were disposed of, a motion for a new trial was made on the ground that one of the jurors was deaf. Evidence was put in upon the subject before the judges who had taken part in the trial, a portion of the evidence being an examination of the juror himself. The motion was denied, the judges stating that they were satisfied that the juror heard substantially all the evidence. The argument addressed to us is a pure argument of fact as to what the proper finding would have been, a question with which we have nothing to do and upon which the judges considered not merely the testimony reported but what they saw at the trial, as it was proper that they should. Assuming every proposition of law

that could be urged in favor of the defendant, there is no ground for an exception.

After the first motion had been overruled, another motion was made that the hearing be reopened and the defendant allowed to introduce further evidence, cumulative in character, being the testimony of a doctor who had been consulted by the juror a little more than three months before the trial. The judges refused this motion on the ground that the doctor's statement did not change their opinion. The defendant's counsel again attempted to save an exception. Apart from what else might be said, the same answer may be made to this as to the other exception. It is perfectly plain that the defendant had no ground for bringing his case here a second time.

Exceptions overruled.

WILLIAM HUME *vs.* GEORGE WALKER.

Essex. November 6, 1901. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Equity Jurisdiction. Partnership.

A bill in equity will not lie to settle the rights of the parties under an agreement of sale by which one of two partners sold out to the other all his interest in the partnership property at the prices named in a certain invoice, if no mistake in the settling of the partnership accounts is alleged and no reformation of the contract is sought.

BILL IN EQUITY, filed January 18, 1901, for an accounting between the plaintiff and the defendant, former partners, to determine their respective rights under an agreement by which the defendant sold out all his half interest in the Hume Carriage Company to the plaintiff at the prices named in a certain invoice.

The defendant filed an answer containing a demurrer, averring, that there was no equity in the plaintiff's bill, and that all matters therein averred were matters of common law.

In the Superior Court *Maynard,* J. made a decree sustaining the demurrer and dismissing the bill.

The bill alleged, that the plaintiff and the defendant had for ten years carried on the business of manufacturing carriages at Amesbury, as copartners, doing business under the name of the Hume Carriage Company, and that on October 6, 1898, the defendant sold out to the plaintiff all his interest in the firm as shown by an invoice of September 1, 1898. The contract was addressed to the plaintiff, signed by the defendant, and read as follows:

"I will sell you all my interest — same being one undivided one half part — in stock and finished and unfinished carriages of the Hume Carriage Co. at invoice price taken Sept. 1st, 1898, less 5 per cent on finished carriages, together with my good will giving you a right to continue business under the firm name of Hume Carriage Co., if wished.

"You to collect all outstanding bills of every kind, and in case of any failures you will deduct my proportional part, or one half of the loss on same from last payment, I to be notified at the time the amount of each loss, and in case last payment is insufficient to cover loss, I agree to pay you an amount sufficient therefor.

"The amount I have overdrawn in excess to Wm. M. Hume shall be deducted by you in making payment, also the amount of Geo. T. Walker's indebtedness — with interest on the latter — to be deducted.

"After the aforesaid amounts are deducted, leaving the amount due me as per invoice, $29,300.50.

"Payments to be made as follows:

"One-fifth of Geo. Walker's net interest in said firm to be paid said Walker in cash, less $1,000.00, which shall be applied to a $4,000.00 note held against said Walker by James Hume. One-fifth to be paid by 4 mos. note, without interest less $1,000.00 to be paid or applied to the said $4,000.00 note held by James Hume. One-fifth to be paid by a 5 mos. note, without interest less $1,000.00 to be paid or applied to $4,000.00 note held by James Hume. One-fifth to be paid by a 6 mos. note, without interest less $1,000.00 to be applied to said $4,000.00 note held by James Hume, and interest due on said note to date. The balance shall remain an open account, without interest, for one year, and after deducting the afore-mentioned losses you to pay the balance in cash.

"The books and accounts to be and remain in possession of Wm. M. Hume."

The invoice of September 1, 1898, named in the contract contained in the list of assets the item "Bills owing us, $54,943.58." The bill alleged, that these bills were not only for carriages actually sold, but also for carriages that had been consigned for sale, and out of said $54,943.58 bills owing the Hume Carriage Company, $38,253.94 were bills thus owing for carriages that had been consigned for sale; and that such consignees were properly considered as the purchasers, subject only to the understanding that they were neither the owners of the carriages consigned nor liable to pay for them until they had succeeded in finding a purchaser, inasmuch as the consignees had a right to sell as principals in their own name, to such parties, at such prices, and on such terms as they saw fit, and the carriages so consigned were invoiced to such consignees at fixed prices, and on a sale by the consignee the consignee himself became the purchaser and principal debtor for the carriages so consigned; that accordingly in the agreement and sale of October 6, 1898, these bills were treated as bills owing the company; that if the carriages that had thus been consigned had been treated as carriages of the Hume Carriage Company, and the five per cent reduction allowed thereon, the amount due the defendant would and should have been several thousand dollars less than agreed; and if the carriages thus consigned had been treated as carriages of the Hume Carriage Company, and included at practically cost price, as were all carriages included as such, the amount due the defendant would and should have been many thousands of dollars less; that they were not so treated, and no attempt was made either on September 1, or on October 6, to ascertain what carriages so consigned had or had not actually been sold by the consignees respectively; that on the contrary, for the purposes of the invoice of September 1, and of the agreement and sale of October 6, all the carriages so consigned were treated as in effect sold and the whole account in every instance as an outstanding bill; and that such treatment was in effect a part of the agreement between the defendant and the plaintiff, and alleged that the defendant was estopped to deny the validity of such treatment.

The bill further alleged, that on July 17, 1899, one Gilbert, doing business under the firm name and style of the Gilbert Carriage Company, failed, owing a comparatively large amount on one of the outstanding bills of the Hume Carriage Company; that the plaintiff immediately gave the defendant notice of the failure, and afterwards, at the request of the defendant and on the defendant's agreement to pay half the expense, caused to be replevied certain carriages that had been consigned to the Gilbert Carriage Company for sale and were found in the possession of that company; that while, under the contract and agreement of October 6, 1898, the consignees were treated as purchasers and the accounts as outstanding bills, nevertheless the parties, especially in the provision allowing the last payment to remain an open account without interest for one year as security against losses, took into consideration that the sale to and liability of the consignee was not absolute, but conditional upon his finding a purchaser, and it was not the intention of the parties to change the sale into an absolute sale, or the liability of the consignee into an absolute debt, but rather that the right to replevy the carriages should be preserved in order that the loss might thus be reduced in case of failures; that no provision, however, was made or express understanding had as to how such replevied carriages should be disposed of or the amount of the loss ascertained in case of any such failure and consequent replevin; that hence out of the failure of the Gilbert Carriage Company and the replevin of the carriages there had arisen a complication and controversy which the defendant and the plaintiff had been unable to adjust amicably, and such that the rights and equities of the parties could not be adequately and completely protected and adjusted in an action at law, but only in equity, permitting a sale of the replevied carriages under the order and direction of the court, and the ascertainment of the net loss on the Gilbert Carriage Company bill, one half of which the defendant agreed to stand.

The bill also alleged that, as the plaintiff was informed and believed, the defendant by mistake erroneously stated the amount of the defendant's net interest in the firm, as shown by the invoice of September 1, 1898, to be $29,300.50, and further failed to take out in any form the five per cent on finished carriages,

as agreed; that the plaintiff, being unfamiliar with the figures, and knowing that the defendant was familiar with them, believed the figures to be as stated by the defendant; that it was only recently, and after the making of the payments named, that the plaintiff discovered the mistake, and that the plaintiff had accordingly overpaid the defendant.

The bill also alleged, that the defendant had brought an action at law against the plaintiff on the contract, which action was pending.

The bill prayed, (1) for an accounting, (2) that the replevied carriages might be sold under order of the court and the plaintiff from the proceeds reimbursed for the expenses of replevying the carriages and the balance divided, (3) that the defendant might be ordered to return the amount overpaid by the plaintiff by reason of the defendant's failure to deduct five per cent on finished carriages, (4) that an injunction might be issued to restrain the defendant from further prosecuting his action at law on the contract, and (5) for further relief.

The case was argued at the bar in November, 1901, and afterwards was submitted on briefs to all the justices.

C. H. Hanson, for the plaintiff.

W. H. Niles, for the defendant.

HOLMES, C. J. This bill is not like those where there has been a mistake in settling partnership accounts and a note given for the balance. The plaintiff alleges no mistake either in the substance of the contract or in the invoice, and he seeks no reformation of either document. On the contrary he says that it was part of the understanding that carriages in the hands of commission houses, although not sold, should be included in "bills owing us." No note has been given and no mistake of any kind is alleged, except that in estimating the amount due to the defendant under his contract and invoice as agreed they forgot to deduct five per cent as stipulated on finished carriages. If the plaintiff is right, that sum will be deducted from the amount remaining due under the contract. The plaintiff alleges in the bill that this is matter which may be proved by parol, and this may be true, because the express statement of the mode of computation and the invoice must make the mistake in the figured total apparent; but at all events no reformation is asked.

The real grievance is something which the plaintiff himself alleges to have been contemplated when the contract was made. The plaintiff and defendant have had to replevy from commission men carriages which are charged for under "Bills owing us." This, the plaintiff says, was contemplated and was to be counted as a "loss" under the contract. If so, it will be allowed for in the defendant's suit for the balance alleged to be due to him. The bill prays among other things for an account but discloses no need of equitable relief on that ground. Taking the bill on demurrer, we must assume that it expresses the plaintiff's case as he is content to leave it. He has not asked to amend, and the bill has been dismissed. It is only fair that he should be held exactly to his pleading, and, as the case stands, we are not prepared to say that the judge of the Superior Court was wrong.

Bill dismissed.

JOHN LYONS *vs.* BOSTON AND LOWELL RAILROAD COMPANY.

Middlesex. November 14, 1901. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Constitutional Law, Obligation of contracts. *Railroad*, Liability for fire. *Insurance*, *Fire*.

St. 1895, c. 293, providing that, when a railroad corporation is held liable for injury to property by fire communicated by its locomotives, it shall have the benefit of any insurance money received by or payable to the owner of the property, is applicable to all such fires occurring after it took effect, whether the policies of insurance were issued before or after its enactment. The statute thus applied does not impair the obligation of the contract contained in the Massachusetts standard form of policy, that "whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers." The assured only agrees to give the insurance company such rights to reimbursement as he may have at the time of the fire, and does not agree to have any such rights. LORING, J. dissenting, on the ground, that St. 1895, c. 293, does not undertake to modify the liability of railroad companies for fires communicated by their locomotives, but undertakes to transfer to the railroad company the abutter's insurance leaving the liability of the railroad company untouched; and that as to policies containing the subrogation clause issued before its enactment, the statute is of no effect, because it attempts to impair the obligation of contracts by applying the fund created by

a policy which stipulated that it should not enure to the benefit of the railroad company toward the extinguishment of the liability of that company. HOLMES, C. J. & HAMMOND, J., also dissenting.

TORT, under the statutes named by the court, for the burning of the house and barn and certain personal property of the plaintiff by fire communicated by a locomotive engine of the defendant. Writ dated September 25, 1896.

In the Superior Court the case was tried before *Dewey*, J., without a jury. It appeared, that the plaintiff owned the buildings and that they were burned on June 15, 1895; that the buildings were subject to a mortgage to the Arlington Savings Bank, and were insured against fire in the Middlesex Mutual Fire Insurance Company, by a policy dated September 1, 1893, the house for $1,500 and the barn for $1,000, and the insurance was made payable to the savings bank above named in case of loss, to the amount of its claim as mortgagee; that the loss had been adjusted and payments made by the insurance company, on September 11, 1895, to the amount of $1,000 on the barn and $1,375 on the house; and that the plaintiff on August 5, 1895, executed an assignment to the insurance company of all claims and right to recover against the Boston and Maine Railroad or any other person or corporation for his loss by fire, and delivered it to the insurance company on September 11, 1895. The policy was in the Massachusetts standard form then prescribed by statute, and contained the following clause: "And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company." The cost of insurance premium was $43.75, and there was no expense of recovery. This action was brought for the benefit of the insurance company.

The defendant asked the judge to rule that, if he found for the plaintiff for damages in burning the house and the barn, the railroad corporation was entitled to the benefit of any insurance upon such property, less the cost of premium and expense of recovery, and that such amount should be deducted from the amount found as damages for such burning of the house and

barn. The judge refused to rule as requested, and found for the plaintiff in the sum of $3,859 as follows: for injury or destruction of barn, $1,100; for injury or destruction of house, $1,600; personal property not insured, $450; interest on the above from the time of the fire, June 15, 1895, $709. The defendant alleged exceptions, which, after the death of *Dewey*, J., were allowed by *Sherman*, J.

St. 1895, c. 293, amending Pub. Sts. c. 112, § 214, was approved April 18, 1895, and in § 2 it was provided that the act should take effect upon its passage. Section 1 concludes as follows: "In case such railroad corporation is held responsible in damages it shall be entitled to the benefit of any insurance effected upon such property by the owner thereof, less the cost of premium and expense of recovery. The money received as insurance shall be deducted from the damages, if recovered before the damages are assessed; if not so recovered the policy of insurance shall be assigned to the corporation held responsible in damages, and such corporation may maintain an action thereon."

The case was argued at the bar in November, 1901, and afterwards was submitted on briefs to all the justices.

F. N. Wier, (*G. F. Richardson* with him,) for the defendant.

G. L. Mayberry, for the plaintiff.

KNOWLTON, J. This action was brought under the Pub. Sts. c. 112, § 214, as amended by the St. 1895, c. 293 (R. L. c. 111, § 270), to recover for an injury to the plaintiff's property by fire communicated by one of the defendant's locomotive engines. The Public Statutes create a liability in such cases, and the amendment provides as follows: "In case such railroad corporation is held responsible in damages it shall be entitled to the benefit of any insurance effected upon such property by the owner thereof, less the cost of premium and expense of recovery. The money received as insurance shall be deducted from the damages, if recovered before the damages are assessed; if not so recovered the policy of insurance shall be assigned to the corporation held responsible in damages, and such corporation may maintain an action thereon." This statute, as amended, determines the rights and liabilities of property owners and railroad corporations. It is applicable as well when a policy is made payable in case of loss to a mortgagee as when the in-

surance is for the owner alone. It is unnecessary to consider how the rights of different parties would be enforced in every possible case, as no question of that kind is before us.

In this case the plaintiff had been paid a large sum under a policy of insurance, and the only question is whether the judge should have ruled as requested "that the railroad corporation was entitled to the benefit of any insurance upon such property, less the cost of premium and expense of recovery, and that such amount should be deducted from the amount found as damages for such burning of the house and barn." The case is plainly within the language of the amendment above quoted, for it is clear that this language refers to the conditions at the time of the fire. It is admitted that the ruling should have been given, except for the fact that the insurance policy was issued before the statute was amended. The statute does not in terms recognize any distinction between cases in which a policy existing at the time of a fire was issued only a short time before the fire and after the enactment of the amendment, and cases in which the policy was issued before the change in the law. If there is a difference, it must be for some reason not referred to in the statute.

The enactment is for the purpose of fixing the rights and liabilities of railroad corporations and property owners. Formerly there was an absolute primary liability of the railroad company for all damages, and an insurance company compelled to pay a loss would be entitled to be subrogated to the rights of the property owner against the railroad corporation on equitable grounds, even if there were no provision for it in the policy. It is not questioned that the Legislature could at any time terminate the liability of railroad corporations for future fires, or limit it, or modify it in any way. The Legislature has seen fit to limit it to such amounts as are not covered by insurance, and in cases where there is insurance to leave the primary liability on the insurance company, where it would be if there were no statute imposing a burden on railroad companies. There is no good reason why the law should not be changed as between landowners and railroad corporations, as well in cases where there are outstanding policies of insurance as in cases where there is no insurance, unless such a change would impair the obligation of the contract between the plaintiff and the insurance company.

The only part of their contract that is material is found in the Massachusetts standard form of policy, and reads as follows: "And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company." St. 1894, c. 522, § 60.

The assured agrees to give the insurance company such rights to reimbursement as he may have at the time of the fire against any party. He does not agree to have any such rights. So far as the existence of such possible rights depends on present or future legislation, both parties to the contract take their chances as to what the law may be when a fire occurs. If, when a policy is issued other parties are in such relations to the property described that if the property should be burned there would be a valuable right of subrogation in favor of the insurer, it may well be that under such a provision in the policy the insured impliedly agrees to do nothing to terminate or modify the right. If in this case the law had remained unchanged, and the plaintiff, before the fire, had released the railroad corporation from its liability under the statute, it might be held that his contract with the insurance company was broken and that he was precluded from recovery under his policy. See *Jackson Co.* v. *Boylston Ins. Co.* 139 Mass. 508, 512; *Attleborough Savings Bank* v. *Security Ins. Co.* 168 Mass. 147. But no such effect can be given to a change of the law in reference to the liability of railroad companies for fires. Both the insurance company and the plaintiff knew that such a change was liable to be made at any time, and that it might materially affect the value to the company of the general right of subrogation which was expressly given by the policy. There is no good reason for holding that such an amendment, which is applicable in terms to all fires that occur after it takes effect, is not applicable as well to those fires against which insurance was effected before the passage of the statute, as to those where policies were issued after the passage of the statute. The questions that arise as to the method of applying and enforcing the statute are precisely the same in cases where the insurance was effected after the amendment

was enacted as in those where it was in existence at the time of the amendment.

A like decision was made unanimously under a similar statute, in *Leavitt* v. *Canadian Pacific Railway*, 90 Maine, 153.

Exceptions sustained.

LORING, J. I regret that I am unable to agree with the judgment of the court.

This action is brought by the Middlesex Mutual Fire Insurance Company, in the name of the plaintiff, to recover for damage done to the plaintiff's house and barn by a fire set by one of the defendant's locomotives. The action is also brought to recover for damage to personal property not insured, and the judge found that the damage done to the house and barn exceeded the insurance; to that extent the action is also for the benefit of the plaintiff; but there is no dispute as to the action, so far as it is an action for the plaintiff's benefit; it is only so far as it is for the benefit of the insurance company that the railroad has set up a defence, and for that reason it must be treated as an action brought by the insurance company for its own benefit, in the name of the plaintiff.

The plaintiff's house and barn were set on fire by the defendant on June 15, 1895; at the time of the fire the insurance company was liable to indemnify the plaintiff for this loss under a policy issued September 1, 1893; one of the terms of the policy, whereby the insurance company had agreed to indemnify the plaintiff against loss by fire, was that whenever it should "pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers." In compliance with this provision of the policy, the plaintiff did in fact assign his right of action against the railroad on the insurance company's paying him the amounts specified in the policy, to wit, $1,500 on the house and $1,000 on the barn; and this action is brought under that assignment.

The defendant sets up in defence St. 1895, c. 293, which took effect April 18, 1895.

The insurance company contends that that act cannot affect its contract with the plaintiff, which was made a little over a

year and a half before the act was passed; and I think that it is right in that contention.

Had the policy contained no stipulation as to subrogation, I agree that the Legislature could have taken away the common law right of subrogation against the railroad and could have transferred the abutter's insurance to the railroad. I think it could have done so on the same ground as that on which it is held that a consignor can agree in a bill of lading to give the carrier the benefit of his insurance, when his policy does not contain any stipulation preventing him from so doing. *Jackson Co.* v. *Boylston Ins. Co.* 139 Mass. 508.

But where it is stipulated in the policy that the insurer shall be subrogated to the rights of the assured, neither the assured nor the Legislature can give the railroad the benefit of the insurance against the protest of the insurance company. The risk assumed by an insurance company under a policy issued to an abutter for indemnity from fire set by a railroad, with a clause giving the insurance company the right to be subrogated to the abutter's right against the railroad, is a different risk from that assumed in case a policy is issued to the railroad for indemnity from the same fires. In case of the first policy, the insurance company has a contract right to be subrogated to the assured's right against the railroad, whatever it may be; if it is absolute, the insurance company, on paying the abutter, can recover from the railroad on proving that the fire was set by it; if the liability of the railroad depends upon its having been negligent, the insurance company must prove negligence on the part of the railroad to make good its claim against the railroad for the loss. But if the company issues a policy to the railroad, its liability is final in every event. It has been held for that reason that a consignor who holds a policy containing such a stipulation cannot transfer his insurance to the carrier. *Carstairs* v. *Mechanics' & Traders' Ins. Co.* 18 Fed. Rep. 473. *Fayerweather* v. *Phenix Ins. Co.* 118 N. Y. 324. *Insurance Co. of North America* v. *Easton*, 73 Tex. 167.

This conclusion cannot be avoided by holding that St. 1895, c. 293, is an act modifying Pub. Sts. c. 112, § 214, which makes railroads absolutely liable for fires set by them in place of leaving the matter at common law, where they were liable for negligence only.

I agree that the Legislature could repeal Pub. Sts. c. 112, § 214, and leave the liability of the railroad to be determined by the principles of the common law. For the purposes of this argument I will go further and admit that the Legislature could have provided that railroad companies should not be liable to abutters for fires set by their locomotives under any circumstances. But in passing St. 1895, c. 293, the Legislature did not undertake to modify the liability of railroads for fires set by them; what it did undertake to do was to transfer to the railroad company the abutter's insurance; the Legislature undertook by this act to do for railroads, in case of the spark risk, what railroads had previously undertaken to do for themselves in other connections, by providing in their bills of lading that they should have the benefit of any insurance held by the consignor. The language of the act indicates that this is what the Legislature thought it was doing; the act provides that "in case such railroad corporation is held responsible in damages it shall be entitled to the benefit of any insurance effected upon such property by the owner thereof." This is an act which purports to transfer insurance and does not purport to be an act modifying the liability of the railroad for fires set by its locomotives.

Further, the abutter who is not insured has the right under the amended act to hold the railroad absolutely liable; and, inasmuch as the railroad under the amended act is absolutely liable to the abutter who is not insured, St. 1895, c. 293, is not an act modifying the liability of the railroad; it is an act dealing with the insurance of the abutter, and leaves the liability untouched.

But my difficulty goes deeper than either or both of these considerations. Whether an abutter is insured or not has nothing to do with the liability of the railroad. It is an outside contract of indemnity, which may be made or may not be made, at the pleasure of the abutter and the insurance company. I agree that after the enactment of St. 1895, c. 293, if the abutter and the insurance company elect to contract for indemnity, they must do so in compliance with St. 1895, c. 293; they must provide in their contract that the insurance shall be for the benefit of the railroad as well as of the abutter, if the railroad elects to take it to its own use. But that result comes from the power

of the Legislature to regulate any and all contracts insuring property within the Commonwealth. That power does not affect this contract, which was made over a year and a half before St. 1895, c. 293, was enacted.

I also agree that the Legislature could have changed the liability of railroad companies or ended it entirely, and, if it had done so, this insurance company could not have recovered in this action. All that the insurance company stipulated for was to have the abutter's rights against the railroad, whatever those rights might be at the time of the fire.

It is said that St. 1895, c. 293, is an act which changes the liability of the railroad. But I cannot persuade myself that that is so. The fact that the abutter is insured is not in its essence a fact on which the liability of the railroad for a fire set by its locomotive engines depends. More than that, it is a fact which in its essence is such that it cannot be made a condition of the railroad's liability for fires set by its locomotive engines. Apart from the power of the Legislature to regulate the terms of future contracts of insurance, and apart from its power to regulate the right of subrogation, the Legislature cannot provide that a railroad company shall be liable to A., who is not insured, and shall not be liable to B., who is insured. That is not a law equally applicable to all under the same conditions; it is open to the same objection that a law would be open to which provided that the railroad should be liable for setting fire to all houses painted white, and should not be liable for setting fire to houses painted in another color. Both provisions equally apply to all who come within the definition in each case, but neither is a general law applicable to all under like circumstances; and for that reason neither of them is within the power of the Legislature.

The effect of the statute is to appropriate the fund created by the policy issued by the insurance company to the extinguishment *pro tanto* of the liability of the railroad. This case may be taken as an example; in this case the house was insured for $1,500 and the barn for $1,000; it was found by the judge, who tried the case without a jury, that the amount of damage done by the fire in case of the house was $1,600, and in case of the barn $1,100; and it is admitted that the plaintiff Lyons is

entitled to judgment for those two sums of $100. The policy creating the fund stipulated that the insurance company should have the rights of the assured against the railroad, and this covenant amounts at least to a covenant that the insurance created by the policy shall not enure to the railroad's benefit. I cannot see how the Legislature can appropriate the fund created by such a prior contract to the extinguishment *pro tanto* of the liability of the railroad, which otherwise remains unchanged, without impairing the rights of the insurance company under the contract contained in the policy which was made before the act was passed.

For these reasons I am of opinion that the ruling made at the trial was right, and that the exceptions should be overruled.

The CHIEF JUSTICE and Mr. Justice HAMMOND also dissent.

IGNES DENE *vs.* ARNOLD PRINT WORKS.

Berkshire. January 6, 1902. — June 17, 1902.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

Negligence, Employer's liability.

The existence of oil on the floor of a mill, causing an operative to slip and receive an injury when walking through a passageway between two machines, is not evidence of negligence on the part of the mill owner, if there is nothing to show how long the oil had been there or what caused it to be there.

There is no duty on the part of a mill owner, to warn a boy between fourteen and fifteen years old, who has worked in the room for two months, as to the danger, if any, of using a passageway between the machine on which he works and another machine, or of getting his hand caught in the gears in case he does so.

TORT for injuries received while employed in the defendant's mill at North Adams. Writ dated December 16, 1899.

In the Superior Court the case was tried before *Bond*, J., who, at the close of the evidence for the plaintiff, ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. C. Crosby & J. F. Noxon, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

MORTON, J. As the plaintiff went to pass through a passageway between two machines, on one of which he worked, in the defendant's mill, he slipped, and to save himself from falling threw out his hand, and it was caught in the gears of one of the machines and injured. This action is brought to recover for the injury thus sustained. At the time of the accident the plaintiff was between fourteen and fifteen years old and had worked about two months on the machine on which he was working when injured. A few minutes before the accident he had started to go to the water closet, passing on his way between these two machines, and had reached the stairs when he turned back to speak of his intended absence to a man in the room whom he was required to notify of the absence. He went back the same way that he had come, and it was while going back that he met with the accident. There was testimony tending to show that the slipping might have been caused by oil on the floor. There was also testimony tending to show that the place where the plaintiff slipped was not lighted. The plaintiff contends that the defendant was negligent in these respects, and that his injury was caused thereby, and also that the defendant was negligent in not instructing him as to the danger of using the passageway.

If the slipping was caused by oil on the floor and was not a pure accident, there is nothing to show how long the oil had been there, or what caused it to be there. It would be holding parties to a liability altogether too strict to say that the presence of oil on the floor of a mill was itself evidence of negligence. Regard must be had to what is practicable and reasonable and it would hardly be possible to operate a mill without more or less oil getting on the floor, especially under and around different machines. We do not see how the absence of light can be said to have caused the injury. The plaintiff went through the passageway on his way to the stairs, and it was then unlighted and was so when he returned. His familiarity with the machine and its surroundings was such that he needed no artificial light. Moreover, if there was negligence on the part of any one in not lighting the gas, it would seem that it was the negligence of a fellow servant, and not of the defendant or of one whose sole or principal duty was that of superintendence. It is manifest, we

think, that the plaintiff needed no warning or instruction as to the danger, if any, in using the passageway, or of getting his hand caught in the gears.

Exceptions overruled.

GEORGE A. NICKERSON & another, executors, *vs.* HARRIET J. VAN HORN & others.

Suffolk. March 13, 1902. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Trust.

A trust, created by will for a granddaughter, providing, that the income shall be paid into her hand, or upon receipts or orders signed by her immediately before the payment, and that the trustees may in their discretion decline to pay her anything, and apply only so much as they see fit to her maintenance and support, or the education, maintenance or support of her children, and accumulate the balance until after her death, gives the beneficiary no absolute right of control or alienation, and so no interest which can be reached by creditors.

In a trust created by a charge upon land, to pay an annuity to a beneficiary, a provision, that the payments shall be made only upon "receipts or orders therefor signed by her at or immediately before the payment thereon, and not by way of anticipation," is equivalent to saying that the beneficiary shall have no power to alienate the annuity, and she therefore has no interest in it that can be reached by creditors.

BILL IN EQUITY, filed February 28 and amended by leave of court December 20, 1901, to reach and apply the income of a trust fund, given to the defendant Harriet J. Van Horn by the will of John Simmons, in satisfaction of the plaintiffs' claim.

The case was heard by *Barker*, J., who found that the trustees under the will of John Simmons, before the filing of the bill, in pursuance of the will transferred to the defendant corporation, the Simmons Female College, the property on which the annuity of $5,000 to the defendant Harriet J. Van Horn was charged; that the trustees had no title to the property on which the annuity was charged, and were not in receipt of the rents and income of that property; that Harriet J. Van Horn was a granddaughter of the testator, and was named in the will as Harriet J. Simmons; that at the date of the filing of the bill the trustees had on hand no income for the defendant Van Horn; and that

at the date of the hearing they had on hand, subject to the provisions of the will, $1,105.63.

Upon these findings and the pleadings the justice, at the request of the parties, reserved the case for the determination of the full court, such decree to be entered as justice and equity might require.

C. E. Hellier, for the plaintiffs.

C. K. Cobb (*W. D. Whitmore, Jr.* with him,) for the defendant Harriet J. Van Horn.

KNOWLTON, J. The plaintiffs seek to reach and apply, in payment of a debt, the interest of the defendant, Harriet J. Van Horn as a *cestui que trust* under the seventh article of the will and the fourth and fifth articles of the codicil to the will of her grandfather, John Simmons. The question as to each of these legacies is whether it is an absolute gift, of which this defendant has the power of alienation, and which is subject to be taken by her creditors for her debts, or whether, under the trust, it is put beyond her control except to use it as it is paid to her when due, and beyond the power of her creditors to have it appropriated to the payment of her debts.

By the decisions in *Broadway National Bank* v. *Adams*, 133 Mass. 170, and the numerous cases that have followed it, it has been held that a testator may create a trust for life by which the beneficiary shall receive payments from time to time, which shall not be subject to alienation or be liable to be taken or appropriated by his creditors. Whether the *cestui que trust* takes an absolute interest, or only a qualified interest over which he has no power until the property comes into his possession, is to be determined in each case by ascertaining the intention of the creator of the trust. *Hall* v. *Williams*, 120 Mass. 344. *Foster* v. *Foster*, 133 Mass. 179. *Wemyss* v. *White*, 159 Mass. 484. *Crawford* v. *Langmaid*, 171 Mass. 309, 312.

By the terms of the trust created by article seven of the will, the trustees are to pay over the remainder of the rents and income to the "granddaughter Harriet, quarter-yearly during her natural life, into her hand or upon her sole and separate receipts or orders therefor in writing signed by her at or immediately before the payment thereon, and not by way of anticipation; . . . or, if said trustees shall see fit, upon her request in writing

signed by her, to permit her to collect and receive to her own use the rents and income of said trust estates; . . . or to apply the said remainder of said rents and income, or so much thereof as said trustees shall see fit, to her individual maintenance and support, and to the education, maintenance and support of any children of hers," with a provision for the accumulation of any unexpended portion, to be paid over after her decease to her children or their issue. It seems very clear that she has not an absolute, unqualified interest in any portion of the rents and income prior to the time when it is paid to her. Not only are the payments to be made into her hand, or upon receipts or orders signed by her at or immediately before the payment, but the trustees may, in their discretion, decline to pay her anything, and apply only so much as they see fit to her maintenance and support, or the education, maintenance and support of her children, and accumulate the balance until after her death. The intention of the testator to leave her without an absolute right of control or alienation of this property seems plain.

The annuity given by articles four and five of the codicil, is also to be held in trust. It is to be paid to her " by the person or persons or corporation who shall at the time when the same shall become payable be in receipt of the rents and income of said land." Then the land is given to trustees in trust " out of the net rents and income " of said estate, " to pay said annuity," etc. The trust follows the land, and is imposed by the will upon the corporation to which the land is conveyed by the original trustees. By one clause the annuity is made a charge upon the estate, but it is still an annuity to a *cestui que trust* to be paid by a trustee or trustees. The same rule of law applies to the construction of the trust in reference to the nature of the interest taken by the *cestui que trust* as we have already stated in reference to ordinary trusts. It is a question whether the testator intended to give her an absolute, unqualified interest in this annuity, which she could alienate if she chose, or an interest which she could not control until the money should become payable. Although this article omits to provide that the income may be accumulated by the trustees for the benefit of her children, it requires that the payments shall be made only upon " receipts or orders therefor in writing signed by her at or immediately

before the payment thereon, and not by way of anticipation," etc. We are of opinion that this is equivalent to saying that she shall have no power to alienate the annuity, and that it shall be held by the trustees to be paid to her personally when due, or to some one to whom she then directs the payment for her. We are of opinion that this is a way adopted by the testator to prevent the possibility of her wasting it or anticipating it by contracting debts on the faith of it, or otherwise leaving herself without the provision intended for her when it should become due. *Smith* v. *Towers*, 69 Md. 77. *Steib* v. *Whitehead*, 111 Ill. 247. *Partridge* v. *Cavender*, 96 Mo. 452. See *Jollands* v. *Burdett*, 2 De G., J. & S. 79; *Gibson* v. *Way*, 32 Ch. D. 361.

In England income coming to a married woman under a settlement which forbids her use or disposal of it by way of anticipation is beyond the reach of creditors; although income which has accrued and become payable before the date of the judgment, but has not been paid over, may be taken for her debts. *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48. *In re Lumley*, [1896] 2 Ch. 690. *Hood Barrs* v. *Heriot*, [1896] A. C. 174. Under this rule the plaintiffs in the present case would take nothing.

Bill dismissed.

CITY OF CAMBRIDGE *vs.* FRANK W. TRELEGAN.

Middlesex. March 13, 1902. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Board of Health. License. Municipal Corporations.

St. 1894, c. 491, § 18, providing for the granting of licenses to slaughter houses by the mayor and aldermen of cities and the selectmen of towns, or such other board of officers as they shall designate, does not take away the power of the board of health of a city under Pub. Sts. c. 80, § 84, to forbid the carrying on of a slaughter house as dangerous to the public health, and the maintenance of a slaughter house so licensed may be prohibited by that board. This power is in no way affected by St. 1897, c. 428, § 2, providing that in towns having a population of more than five thousand, the board of health instead of the selectmen shall have charge of licensing slaughter houses.

HOLMES, C. J. This is a bill in equity to restrain the defendant from carrying on the business of slaughtering calves at num-

ber 20 Clay Street in Cambridge. The defendant has a license from the board of aldermen under St. 1894, c. 491, § 18, as amended by St. 1895, c. 496, § 4, and the only question raised or argued is whether this license is good as against a prohibition by the board of health of the city under Pub. Sts. c. 80, § 84.

The act of 1894 did not have in mind all the objects which are to be considered by a board of health. It was intended to stop the spread of contagion and the sale of diseased meats, but the welfare of the neighborhood of a slaughter house in other respects hardly seems to have been within its scope. This is a board of health's ordinary business, and a mere fact that a license from the mayor and aldermen or selectmen was required by the act of 1894 to carry out its purposes is not enough to put an end to the power of boards of health to secure the public health in other respects. The requirement of the license in St. 1894, c. 491, is consistent with their power to forbid the continuance of a slaughter house in a certain place. The court does not regard the difficulty as increased by St. 1897, c. 428, § 2, now taken up into R. L. c. 75, § 99. That statute substitutes a license from the board of health for a license from the selectmen in towns of more than five thousand inhabitants, but leaves the effect of such a license as it stood under St. 1894.

From its origin the policy of requiring the license mentioned has been shown not to be exclusive of the exercise of their usual powers by boards of health by the express grant of power to the State board of health to prohibit carrying on the business of slaughtering in a building or premises occupied for that purpose. St. 1871, c. 167, § 2. St. 1874, c. 308. Pub. Sts. c. 80, § 93. R. L. c. 75, § 109. The court is of opinion that this grant of power is not exclusive and that it would be unwarranted and anomalous to hold the license good against the local board acting under Pub. Sts. c. 80, § 84, R. L. c. 75, § 91, when it would be no answer to the State board acting under what is now another section of the same chapter of the Revised Laws. See *Sawyer* v. *State Board of Health*, 125 Mass. 182, 191, 192; *Stone* v. *Heath*, 179 Mass. 385.

Decree for plaintiff.

W. R. Peabody & G. A. A. Pevey, for the plaintiff.

F. Hunt, for the defendant.

WILLIAM S. HIXON & others *vs.* JAMES GOULD & others.

Suffolk. March 14, 1902. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Municipal Corporations. Chelsea. Statute, Construction.

By St. 1900, c. 202, "The city of Chelsea, for the purpose of purchasing land and erecting thereon a high school building, for furnishing the same, and for other school purposes, and for erecting a fire station and enlarging the Spencer Avenue schoolhouse," was given authority to incur indebtedness beyond the limit fixed by law to an amount not exceeding $200,000. *Held*, that the intention of the Legislature was to authorize indebtedness beyond the debt limit to the amount named, on condition that the money should be expended for school purposes and for a fire station, and that under the words "other school purposes," after a fire station had been constructed, the city could expend the remainder of the money on the construction of a grammar schoolhouse not mentioned in the act and in erecting a high school building on a lot already occupied by another schoolhouse which was to be moved away, to the exclusion of the specific school purposes named in the act.

PETITION, filed November 22, 1901, by ten taxable inhabitants of Chelsea under St. 1898, c. 490, for an order restraining the mayor and other officers of that city from raising or expending money or incurring obligations for the purpose of constructing a grammar schoolhouse on the "Dr. Forsyth lot" and building a new high school on land already owned by the city, and doing other things alleged not to be authorized by St. 1900, c. 202.

St. 1900, c. 202, provided, that "The city of Chelsea, for the purpose of purchasing land and erecting thereon a high school building, for furnishing the same, and for other school purposes, and for erecting a fire station and enlarging the Spencer Avenue schoolhouse, may incur indebtedness beyond the limit fixed by law to an amount not exceeding two hundred thousand dollars."

The case was heard by *Barker*, J. It appeared, that the sum of $22,000 had already been raised by the issue of bonds under the act, and had been used for the erection of a fire station, concerning the legality of which no question was raised; and that the board of aldermen had undertaken to provide for the expenditure of the entire balance of the fund by passing the following order:

"Ordered, that His Honor the Mayor be and he hereby is authorized to purchase the lot of land on Everett Avenue and West Third Street, owned by the heirs of Dr. Forsyth, and the vacant lot of land on the northerly side of Library Street, and lying between Chestnut and Cherry Streets.

"Ordered, that a new Grammar School Building be erected on the Dr. Forsyth lot and a new High School Building be erected on the so-called Broadway lot, both buildings to be built according to plans and specifications by W. Hart Taylor now before the Board of Aldermen which are hereby approved.

"Ordered, that the present Broadway School-house be moved on to the aforesaid lot, northerly of Library Street, and it be placed on a substantial foundation and be refitted and furnished for manual training purposes, and that in the basement of said building, as relocated, the heating apparatus for the new High School-house shall be placed.

"Ordered, that said High School building shall be furnished and fitted for occupancy, that the grounds about the Grammar School, the grounds about the Manual Training School and the High School building shall be graded and seeded.

"Ordered, that the sum of $48,000 be and is hereby appropriated for, purchasing land and erecting the Grammar School-house and that the sum of $130,000 be and is hereby appropriated for the purchase of land, relocating and remodelling the present Broadway Building and erecting and furnishing a new High School-house.

"All sums of money called for by these orders to be charged to the loan authorized by chapter 202, Acts of 1900, when made."

By a further order the board directed the preparation and sale of bonds for the purpose of raising the $178,000 under the act for the purposes prescribed in the foregoing orders providing for the construction of school buildings, which bonds were in the course of preparation when the petition was filed but had not been executed nor issued.

It further appeared, that no part of the authorized $200,000 had been employed for the purpose of enlarging the Spencer Avenue schoolhouse, and that all of the fund had been appropriated, so that there was then no money available for that purpose. It appeared in evidence that an order for the enlargement of the

Spencer Avenue school at a cost of $15,000 had been presented to the board, and its adoption refused; and it further appeared, that the Spencer Avenue schoolhouse was used for primary school purposes and was situated upon the opposite side of the city and more than a mile from the proposed site for the new grammar school upon the Dr. Forsyth lot. It appeared also that the Broadway lot, upon which the city proposed to erect a high school building, was then occupied by a primary school building which was in actual use by a primary school.

The respondents denied in their answer that the persons intended to be benefited by the enlargement of the Spencer Avenue school would not be benefited by the proposed new school upon the Dr. Forsyth lot. No evidence was offered by the respondents.

At the close of the evidence, the petitioners requested the justice to rule as follows:

1. The orders providing for the construction of the grammar schoolhouse on the "Dr. Forsyth" lot and the high schoolhouse on the "Broadway" lot commit the city to an illegal expenditure of the money authorized to be borrowed under St. 1900, c. 202.

2. The city of Chelsea cannot use money borrowed under St. 1900, c. 202, for the purpose of building a schoolhouse not specified in the act, if the effect of that use be to render it impossible to provide for a purpose which is specified in the act.

3. The words "other school purposes" in that act relate to purposes connected with the high school.

The justice declined so to rule, and ordered a decree to be entered in favor of the respondents, dismissing the petition; and the petitioners alleged exceptions.

W. M. Noble, for the petitioners.

L. L. G. DeRochemont, for the respondents.

KNOWLTON, J. The first sentence of the St. of 1900, c. 202, is as follows: "The city of Chelsea, for the purpose of purchasing land and erecting thereon a high school building, for furnishing the same, and for other school purposes, and for erecting a fire station and enlarging the Spencer Avenue schoolhouse, may incur indebtedness beyond the limit fixed by law to an amount not exceeding two hundred thousand dollars."

The questions raised by the bill of exceptions relate to the meaning of the words "for other school purposes." The petitioners seek to engraft upon them a limitation which shall make them apply only to school purposes connected with the high school building. They contend that no part of the amount borrowed can be used for any school purpose not directly connected with the specific objects mentioned, at least until all of those objects are accomplished. The respondents contend that the purpose of the statute was to relieve the city to the amount of $200,000 from the restriction of the statutory debt limit, on condition that the money be expended for school purposes and for a fire station, and in their view the mention of specific school purposes is not by way of limitation, but only to make plain the necessity for such legislation. Section 2 of this statute repeals the St. 1897, c. 218, § 4, which last mentioned section fixes the limit of indebtedness for the city from and after the time of its enactment.

The arguments in support of the opposing contentions of the parties are nearly evenly balanced. The question is whether these words shall be construed narrowly or broadly. We are of opinion that the better reasoning calls for a broad and liberal construction of them. Ordinarily the mode of expending money for school purposes and the determination of what schoolhouses shall be built and where they shall be built, and whether particular schoolhouses shall be repaired, is left by the Legislature with cities and towns. In this case the important question for the Legislature was whether the debt limit of Chelsea should be raised with a view to the erection of a fire station and for school purposes. It would have been unwise for the Legislature to attempt to determine the details of expenditure, or how much should be expended for one of the specific objects mentioned and how much for another. In fact, no such determination was attempted, but the distribution of the expenditure among the particular objects named was left to the city. We see no good reason why "other school purposes" do not stand in as favorable a relation to the city's right to expend money as either of the schoolhouses mentioned. Particular objects having been brought to the attention of the Legislature sufficient to justify an extension of the debt limit, the Legislature extended that limit, and

gave authority to the city broad enough to permit expenditure for any school purpose. In the opinion of a majority of the court the entry must be.

Exceptions overruled.

DARIUS M. NICKERSON, JR., executor, appellant.

Barnstable. March 17, 1902. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

Equity Jurisdiction, Bill for instructions. *Executor.*

The executor under the will of one who was the executor and residuary legatee under the will of another has no *locus standi* to maintain a bill for instructions as to whether his testator as residuary legatee under the earlier will took absolutely or only for life.

HOLMES, C. J. This is a petition for instructions as to whether the residuary clause of the will of one Clement Kendrick gave the residue to Sarah A. K. Turner, the residuary legatee, absolutely or only for life. Sarah Turner was executrix of Kendrick's will. The petitioner is the executor of Sarah Turner's will. The petition alleged nothing to give him a *locus standi* to ask instructions, and the facts afterwards agreed disclose merely that Sarah Turner's account showed the residue to have been transferred to herself and that the petitioner has in his hands the proceeds of the property. It does not appear that the property exists in a separate and identified form, and it cannot be presumed to do so in view of the appropriation by Sarah Turner. The petitioner has no standing under the will of Kendrick, of course, and it does not appear that he holds a fund in a fiduciary capacity by his own election. Indeed he could not do so in such a sense as to entitle him to come here. His only relation to the fund is that he has it in his hands and that he represents a person who claimed it as hers. If it is not hers he must give it up or make it good, but that is not enough to make him a trustee and to entitle him to petition for instructions, however willing he may be to conform to the opinion of the court. He does not succeed to Sarah Turner's fiduciary

position as Kendrick's executrix. He is merely a possible defendant in a possible suit, and as he represents the opposing claim there is nothing for him to do but to abandon it or to await the action of the other side.

Petition dismissed.

D. M. Nickerson, Jr., pro se.

T. H. Armstrong, for the residuary devisees under the will of Sarah A. K. Turner.

C. Bassett, for the heirs at law of Clement Kendrick.

JOHN B. RATIGAN, executor, *vs.* THOMAS JUDGE.

Worcester. March 18, 1902. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Evidence, Opinion.

On the issue of soundness of mind a witness not an expert cannot be asked whether an alleged testator was subject to delusions or hallucinations.

APPEAL from a decree of the Probate Court of the County of Worcester, allowing a certain instrument as the will of one Lackey Judge.

The case was sent to the Superior Court for the trial of issues framed by a justice of this court. The issues were as follows: "First. Was the instrument propounded as the last will and testament of Lackey Judge duly executed in accordance with law? Second. Was the said Lackey Judge, at the time of the execution of said will, of sound mind? Third. Was said Lackey Judge procured to execute said will by fraud and undue influence exercised upon him by Andrew Judge and Mary Judge, or one of them."

At the trial of the issues before *Fox*, J., the appellant offered in evidence the depositions of certain persons living in Clinton, Missouri. Each of these depositions contained the question in regard to the alleged testator "Was he subject to delusions or hallucinations?" The questions and the answers to them were

excluded by the judge, and the appellant excepted. None of the witnesses were qualified as experts. The excluded answers were, in substance, that the alleged testator was under a delusion that some one was trying to poison him or that he was being poisoned.

The jury answered the first two issues in the affirmative and the third in the negative, thus sustaining the will; and the appellant alleged exceptions.

The case was submitted on briefs at the sitting of the court in March, 1902, and afterwards was submitted on briefs to all the justices.

W. C. Mellish & G. K. Hudson, for the appellant.

J. B. Ratigan, H. Parker, & R. P. Esty, for the executor.

BARKER, J. The question, "Was he subject to delusions or hallucinations?" required of the deponent an opinion upon the mental condition of the testator. See *Clark* v. *Clark*, 168 Mass. 523, and cases cited.

Exceptions overruled.

JOHN HAVEN *vs.* GEORGE HAVEN, executor, & others.

Suffolk. March 19, 1902. — June 17, 1902.

Present: HOLMES, C. J., MORTON, LATHROP, & BARKER, JJ.

Evidence, Of foreign law. *Joint Owners and Owners in Common. Perpetuities. Heirlooms. Equity Pleading and Practice*, Parties. *Limitations, Statute of*, Special of two years. *Words*, "Joint owners."

A dictum of the highest court of another State is evidence of the law of that State.

The will of Ann Haven, of New Hampshire, who died there in 1849, contained the following provision: "It is also my will that the portraits of my late husband and of myself, which were painted by Stuart, shall remain in the mansion house, the use of which was bequeathed to me by my late husband during my life, so long as any of my lineal descendants shall occupy the same; and when said house shall cease to be occupied by any of my said descendants, I give said portraits to such of my four sons as shall then be alive, and if none of them shall then survive, I give said portraits to the male descendants of my said sons." The house continued to be occupied by lineal descendants of Ann Haven until some time in 1895, and apparently until 1898, up to which time the portraits remained there. In 1896 a petition was filed in the Probate Court in New

Hampshire in which Ann Haven's estate had been settled, praying for the appointment of an administrator *de bonis non* of her estate on the ground that the portraits were unadministered assets. This case came by appeal and reservation to the full bench of the Supreme Court of New Hampshire, who affirmed a decree dismissing the petition and declared in the opinion of the court, that "The rights of parties in the portraits furnish no occasion for further administration of Ann's estate. The only parties having such rights are the plaintiff, the defendant, and George G. Haven, who are tenants in common of the portraits." The three persons thus designated were the male descendants of the sons of Ann Haven, all of those sons being dead. The same plaintiff filed a bill in equity in this Commonwealth under St. 1891, c. 383, praying the court to order a sale of the portraits and a proper disposition of the proceeds. A demurrer to the bill was overruled. *Held*, that the demurrer was overruled rightly and that the plaintiff was entitled to the order prayed for; that, although the portion of the above quoted opinion in regard to the title to the portraits might be *obiter dictum*, it was evidence of the law of New Hampshire, and disposed of the case, so that it was not necessary for this court to consider, whether under our law the gift to the male descendants of the four sons would be valid, or whether the direction, that the portraits should remain in the mansion house so long as it was occupied by any of Ann Haven's lineal descendants, could be supported as a disposition of the portraits as heirlooms. *Held, also*, that the plaintiff was guilty of no laches, as the decision of the Supreme Court of New Hampshire gave full effect to the clause giving the portraits to the male descendants of the four sons, and by that clause the plaintiff and the other two male descendants did not become entitled to the possession of the portraits until the mansion house had ceased to be occupied by a lineal descendant of Ann Haven, and there was nothing to show laches since that time, or to show that if there had been delay the defendant was prejudiced by it. *Held, also*, that it was not necessary, that the legatees, distributees and heirs at law of the children of Ann Haven should be made defendants, the executors and administrators of the estates of those children having been made defendants and representing them.

A bill in equity under St. 1891, c. 383, praying for a sale of personal property owned in common and a proper disposition of the proceeds, is not barred by the special statute of limitations set up by the executor of one of the owners in common. Such a proceeding is not to enforce a claim or liability against the estate, but to determine the rights, if any, of various parties and estates in the property in question.

In St. 1891, c. 383, providing for the determination of "all questions and controversies arising between joint owners of personal property, and their legal representatives, relating to such property", the words "joint owners" include owners in common.

MORTON, J. This is a bill in equity under St. 1891, c. 383, for the sale of two portraits of John Haven and his wife, Ann Haven, and the distribution of the proceeds. The principal question at issue is the title to the portraits. There was a motion to dismiss for want of proper parties, and a demurrer, for that and other reasons, by George Haven. Both were overruled and he appealed. An answer was filed by him denying

generally the allegations of the petition, and setting up in his capacity as executor of the will of George Wallis Haven, the special statute of limitations as a bar. Subsequently a statement of facts was agreed to by him and the plaintiff. All the other defendants, except in a single instance, have answered waiving proof of the facts alleged in the petition and agreed to by the plaintiff and the defendant George Haven, and submitting their rights to the determination of the court. The exception referred to is in the case of Katharine M. and Eliza B. Haven, who "do not admit the jurisdiction of the Supreme Court of New Hampshire sitting in probate . . . to adjudicate upon any right which they may have in the portraits." In respect to all other matters alleged in the petition, they submit their rights to the determination of the court. The case was reserved by a single justice for the full court upon the pleadings, the agreed statement of facts, and the appeals from the orders overruling the motions to dismiss and the demurrer.

It appears from the agreed facts, that for many years previous to his death John Haven owned and occupied a mansion house in Portsmouth, New Hampshire. He died in 1845 and bequeathed the portraits to his wife, Ann Haven, with a life estate in the mansion house, and the remainder to his four sons John Appleton Haven, the father of the plaintiff, Joseph Woodward Haven, Alfred Woodward Haven and George Wallis Haven the father of the defendant George Haven. His widow occupied the mansion house till her death in 1849. Prior to her death George Wallis Haven had purchased the interest of his three brothers in the mansion house and after her death he occupied it till his death in 1895. He devised the mansion house to his widow for life with remainder to his son George Haven aforesaid. The widow occupied till her death in 1898. From the death of John Haven in 1845 down to the death of the widow of George Wallis Haven in 1898 the portraits hung in the parlor of the mansion house. Till 1895 they hung there without any express agreement. The plaintiff has frequently seen the portraits there, "but never made any claim to them until after George W.'s death", and "there was no direct evidence, one way or the other," if that is material, "as to when he first learned of the provisions of Ann's will." Shortly after the death of the widow of George

Wallis Haven in 1898 the portraits were removed by the defendant George Haven to Boston where they now are. The mansion house has been sold and has ceased to be occupied by lineal descendants of Ann Haven.

The will of Ann Haven provided amongst other things as follows: "Sixth. It is also my will that the portraits of my late husband and of myself, which were painted by Stuart, shall remain in the mansion house, the use of which was bequeathed to me by my late husband during my life, so long as any of my lineal descendants shall occupy the same; and when said house shall cease to be occupied by any of my said descendants, I give said portraits to such of my four sons as shall then be alive, and if none of them shall then survive, I give said portraits to the male descendants of my said sons.

"Seventh. All the rest, residue and remainder of my estate, after the payment of my just debts and the legacies aforesaid, I give, devise and bequeath to my seven children John Appleton Haven, J. Woodward Haven, Alfred W. Haven, George W. Haven, Eliza W. Haven, Adeline H. Cheever, and Susan H. Emerson to be holden by them in equal shares."

None of the children of Ann Haven were alive when this bill was filed, and none of the four sons were alive when the mansion house ceased to be occupied by her lineal descendants.

In 1896 the plaintiff petitioned the Probate Court of Rockingham County, New Hampshire, in which the estate of Ann Haven had been settled, for the appointment of an administrator *de bonis non*, etc., on the ground that the portraits were unadministered assets. Due notice of the pendency of this petition was given and the defendant appeared and opposed it, and it was dismissed. An appeal was taken to the Supreme Court. The decree was affirmed by that court. The presiding justice made a finding of facts and reserved the case on the plaintiff's exceptions for the full bench. The full bench overruled the exceptions. It is agreed that that case may be referred to, and in the opinion by *Blodgett*, J. it is said, "The rights of parties in the portraits furnish no occasion for further administration of Ann's estate. The only parties having such rights are the plaintiff, the defendant, and George G. Haven, who are tenants in common of the portraits."

The executors and administrators of the children of Ann Haven are parties defendant except in a single instance, and the male descendants of the four sons have also been made parties defendant in their own right. The single exception is in the case of Alfred Woodward Haven who died testate in 1885 leaving a widow and two daughters. The widow was appointed executrix and took all the property for life with remainder to the two daughters who are parties defendant and have appeared and answered as above stated. The widow is dead and no administrator has been appointed to succeed her. The time for proof of claims against the estate has long since passed.

The only one of the defendants who has contested the present bill is George Haven and we shall speak of him as the defendant.

The plaintiff contends the effect of the New Hampshire decision is to establish that the title to the portraits is in himself, the defendant and George Griswold Haven the son of J. Woodward Haven. It is agreed that "It was, by the opinion of said court [the full bench of the Supreme Court of New Hampshire] finally adjudicated that the only persons having rights in said portraits were said George Haven, George Griswold Haven, and the petitioner, who were tenants in common of the portraits." The defendant denies that the decision and the facts agreed in regard to the overruling of the exceptions are competent evidence; at least that is the way in which we interpret the sentence in the agreed facts relating to the matter. But it is clear that although so much of the opinion as relates to the title to the portraits may be *obiter dictum* and therefore the title may not be *res adjudicata*, it is evidence of what the law of New Hampshire is. *Hackett* v. *Potter*, 135 Mass. 349. *Sawyer Lumber Co.* v. *Boston & Albany Railroad*, 173 Mass. 502. It is plain that the courts of New Hampshire had jurisdiction of the *res*. Indeed, it is not contended by the defendant that they had not. And in view of the agreement as to the effect of the decision if the facts in regard to it are competent, as we think they are, it follows it seems to us that the plaintiff's contention is right. This renders it unnecessary to consider whether under our law the gift to the male descendants of the four sons would be valid, or whether the direction that the por-

traits should remain in the mansion house so long as it was occupied by any of Ann Haven's lineal descendants could be supported as a disposition of the portraits as heirlooms, as the defendant contends it can. In regard to this contention it may be observed that assuming that under our law as under the English law, see *Hill* v. *Hill*, [1897] 1 Q. B. 483, personal chattels may be disposed of by will so as to pass with the realty as heirlooms or as fixtures in the nature of heirlooms, there is no intention manifested that the title to or even the possession of the portraits should pass with or accompany the title to the mansion house. It is also unnecessary to consider the defendant's contention that he has acquired title to the portraits by adverse possession.

The defendant further contends as executor of the will of George Wallis Haven, that the petition is barred by the special statute of limitations. But this is not a suit or proceeding to enforce a claim or liability against that estate, but to determine the rights, if any, of various parties and estates in the property in question, and what shall be done with it. It does not therefore come within the purview of the special statute of limitations. The defendant also objects that the legatees, distributees and heirs at law of the children of Ann Haven should have been made parties defendant, and that this is matter of jurisdiction. Assuming that the objection is jurisdictional the answer is that the executors and administrators were the successors in title and they have been made parties defendant. In the single instance in which there is no executor or administrator nothing would be gained by requiring the appointment of one. The motion to dismiss was therefore properly overruled. The defendant further objects that St. 1891, c. 383, is not applicable for the reason that the ownership set forth is not a joint ownership but a tenancy in common. But we think that the words of the statute on which he relies, "joint owners of personal property", describe an ownership where the property belongs or may belong to two or more persons in undivided shares, and are not limited to cases where there is a joint tenancy in the strict and technical sense of those words. The exception in regard to copartners and copartnership property tends to show that this is the true construction, since copartners are not in the strict sense of the

words joint tenants, and the provision in regard to "legal representatives" also tends in the same direction. An executor or administrator takes no title to the joint estate on the death of a joint tenant. And the fact that the rights of "legal representatives" are provided for goes to show that the words "joint owners" could not have been used in their strict and technical sense.

The defendant objects still further that the plaintiff is barred by laches. But apparently the Supreme Court of New Hampshire has given full effect to the clause of the will giving the portraits to the male descendants of the four sons, and under that clause the plaintiff and defendant and George Griswold Haven did not become entitled to the possession of the portraits till the mansion house ceased to be occupied by lineal descendants of Ann Haven. Since that event happened there is nothing to show that there has been any laches on the part of the plaintiff or that the delay if delay there has been has operated in any way to the prejudice of the defendant. See *Barnes* v. *Boardman*, 149 Mass. 106; *Tucker* v. *Fisk*, 154 Mass. 574.

The result is that we think that the demurrer was rightly overruled and that the plaintiff is entitled to an order directing the portraits to be sold and the proceeds distributed between himself, the defendant and George Griswold Haven.

So ordered.

R. S. Gorham & Roland Gray, for the plaintiff.

H. Parker & H. H. Fuller, for George Haven.

TIMOTHY RICHARDSON *vs.* CLINTON WALL TRUNK MANUFACTURING COMPANY & others.

Worcester. May 21, 1902. — June 17, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Equity Jurisdiction, Over foreign corporations. *Receiver*. *Corporation*, Foreign.

A bill in equity may be maintained by a stockholder of a corporation organized in another State and doing business here, against the corporation and its president and directors, to restrain the directors from carrying on in this Commonwealth a business not authorized by the company's charter, and also to compel the directors to account for property of the corporation misappropriated by them, this being in the nature of a suit by the corporation against wrongdoers whose persons and property are in the Commonwealth rather than a regulation of the internal affairs of the foreign corporation.

In a suit by stockholders to enjoin the directors of a foreign corporation from doing business *ultra vires* and to compel them to account for property of the corporation misappropriated by them, the appointment of a receiver generally is not necessary or proper, although it is possible that a special case might arise in which such an appointment would be justified.

BILL IN EQUITY, filed September 19, 1900, and amended September 29, 1900, and March 16, 1901, by a stockholder, in behalf of himself and all other stockholders except the defendants, in the Clinton Wall Trunk Manufacturing Company, a corporation organized in the State of Maine and doing business in this Commonwealth, against Lyman Leighton, Albert E. Leighton, C. M. Leighton and Caroline S. Leighton, alleged to be controlling stockholders and the president and directors of the corporation.

The defendants' answer to the amended bill contained a demurrer.

In the Superior Court the case came on to be heard before *Gaskill*, J., upon the plaintiff's bill and amendments, the memorandum of findings of *Bond*, J., the demurrer to the bill before the last amendment, and the demurrer in the answer to the bill as amended, and, at the request of the parties, the case was reserved for the consideration of this court. If the demurrer to the amended bill should be sustained without further amendments being allowed to the plaintiff, the bill was to be dismissed; otherwise, such order was to be made as justice and equity might require.

J. Smith, for the plaintiff.

H. Parker & H. H. Fuller, for the defendants.

KNOWLTON, J. The defendant corporation was established under the laws of Maine; but all of its officers, except its clerk, are residents of this Commonwealth, and all its property is in Massachusetts. The prayer of the bill as originally drawn was that the officers be enjoined from disposing of any of its property, that a receiver be appointed, that the affairs of the corporation be wound up by the collection of its assets and the payment of its debts, and that it be dissolved.

It is obvious that courts of equity have no jurisdiction to dissolve a foreign corporation or to liquidate its indebtedness, and this primary purpose of bringing the bill has been abandoned.

The prayer of the amended bill is for the appointment of a receiver, for an injunction against the defendant officers to prevent them from using the name or property of the company for carrying on business contrary to its charter, for an account of the company's property taken and misappropriated by them, and for general relief. It is stated in the bill that the defendant directors have fraudulently used the property and franchise of the corporation for their own private gain, and have misappropriated the property in different ways, and have caused the corporation to carry on business which it was not permitted to do under its charter. The bill states a case which entitles the plaintiff to relief, and the averments make it plain that he could not expect to obtain favorable action from the directors or from the corporation, and that he would be left without remedy if he was not permitted to bring the suit in his own name. *Brewer* v. *Boston Theatre*, 104 Mass. 378. *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495.

In reference to the allegations that the defendant directors are engaging the corporation in business *ultra vires*, the plaintiff is not left to seek his remedy through the attorney general of Maine acting in the public interest in the courts of that State. The corporation is doing business under our statutes in this Commonwealth. The plaintiff's rights are affected and his property is imperilled by the unlawful action of the defendants within our jurisdiction. The parties are all subject to the process of our courts. The plaintiff should have relief in a court

of equity against the continuance of this violation of our laws. The principles applicable to the unlawful conduct of the directors in this particular are like those invoked against the frauds of directors in misconducting the business of a corporation or misappropriating its property for their own personal gain. *Brewer* v. *Boston Theatre*, *ubi supra*. *Dunphy* v. *Traveller Newspaper Association*, *ubi supra*. *Hodges* v. *New England Screw Co.* 1 R. I. 312. *Gregory* v. *Patchett*, 33 Beav. 595. *Colman* v. *Eastern Counties Railway*, 10 Beav. 1. *Salomons* v. *Laing*, 12 Beav. 339. *Bagshaw* v. *Eastern Union Railway*, 7 Hare, 114. *Cunliff* v. *Manchester & Bolton Canal Co.* 2 Russ. & M. 480, n. We are of opinion that, upon proof of its averments, the bill can be maintained for the purpose of enjoining the defendant directors from further using the company's name or property in carrying on in this Commonwealth a business not authorized under the company's charter.

The plaintiff asks that the defendant directors be ordered to account for the company's property taken and misappropriated by them. It is contended that this calls for an interference by this court with the management of the internal affairs of a foreign corporation, which should be left to the courts of the State in which the company is incorporated. The rule is well established in this Commonwealth that ordinarily our courts will decline jurisdiction in matters which pertain to the interior life and conduct of a corporation as a creature of a foreign State, and which particularly involve a knowledge and application of the statutes of that State, and which often require for their proper adjustment full jurisdiction of the corporation and of its members for different purposes. *Kimball* v. *St. Louis & San Francisco Railway*, 157 Mass. 7, and cases cited. *Wason* v. *Buzzell*, *ante*, 338. *North State Copper & Gold Mining Co.* v. *Field*, 64 Md. 151. But this part of the present plaintiff's case is rather in the nature of a suit by the corporation against wrongdoers whose persons and property are in this Commonwealth. That an account may be taken in such a case, even when the corporation was organized in another State, was expressly decided in *Wineburgh* v. *United States Steam & Street Railway Advertising Co.* 173 Mass. 60.

The remaining prayer is for the appointment of a receiver.

Such an appointment is merely ancillary to other relief. If this court had jurisdiction to dissolve the corporation and wind up its affairs, and if a case were made out for such relief, the appointment of a receiver would be proper. But the appointment of a receiver is not necessary or proper as ancillary to an injunction against doing business *ultra vires*, or to an order for an account of property misappropriated by directors. Ordinarily a receiver will not be appointed in actions against directors or officers of a corporation for misconduct in its management. *Neall* v. *Hill*, 16 Cal. 145, 149. *Empire Hotel Co.* v. *Main*, 98 Ga. 176, 183. *McGeorge* v. *Big Stone Gap Improvement Co.* 57 Fed. Rep. 262, 270. Nor will such an appointment be made when a receivership would amount in effect to a dissolution of the corporation. *United States Trust Co.* v. *New York, West Shore & Buffalo Railway*, 101 N. Y. 478, 483. *Mason* v. *Supreme Court of the Equitable League*, 77 Md. 483, 485. We do not decide that there might not be facts which would justify the appointment of a temporary receiver in a suit founded on the misconduct of directors, even when a court has no jurisdiction to liquidate the affairs of the corporation. But in this bill there are no averments which would justify the court in making such an appointment.

Inasmuch as the bill states a case which entitles the plaintiff to a part of the relief prayed for, the entry will be

Demurrer overruled.

WEST SPRINGFIELD AND AGAWAM STREET RAILWAY COMPANY *vs.* HENRY E. BODURTHA & others.

Hampden. September 25, 1901. — June 18, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

Street Railway, Condition in location. *Contract*, Implied.

If a town grants to a street railway company a location, to reach which it is necessary to construct a railway in an adjoining town, and the last named town refuses a location, this does not relieve the railway company from the performance of a condition in the location granted by the first named town, that the

company shall build ten miles of road within one year, if under the location more than ten miles of road can be built in that town alone, and, for the same reason, it is immaterial, that a railway company, in another State adjoining the town, under substantially the same management had expended a large sum of money in grading, preparatory to constructing a road to meet the proposed railway at the State line.

A street railway company asked a town for a location, and presented a draft of a location containing a condition that the railway company should deposit the sum of $2,000, which should be paid to the treasurer of the town if ten miles of road were not built within one year. The location was granted on the terms asked, and the railway company made the deposit. The road was never built, and the railway company brought a bill in equity to restrain the payment of the $2,000 to the town treasurer. *Held*, that the payment being voluntary the court would not assist the plaintiff in recovering it, whether the condition proposed by the plaintiff and accepted by the town was against public policy or not.

BILL IN EQUITY, filed January 3, 1900, by the West Springfield and Agawam Street Railway Company against the selectmen of the town of Agawam, to restrain them from paying to the treasurer of that town $2,000 deposited by the plaintiff under a condition in the location granted by the town to the plaintiff that the plaintiff should construct ten miles of road within a year.

At the hearing in the Superior Court, it appeared, that the defendants as selectmen of the town of Agawam, on October 28, 1898, granted a location to the plaintiff containing among other conditions the following:

"As a condition of the granting of this location the said petitioners, Directors of the Association for the formation of the West Springfield and Agawam Street Railway Company, shall upon the granting of this location, pay to Henry E. Bodurtha, R. Mather Taylor and John H. Reed the sum of Two Thousand Dollars ($2,000) to be held by them and the survivors of them, but nevertheless in trust for the following purpose, to wit: To safely invest said sum for the term of one year from the date of payment to them, and at the end of said term, if ten (10) miles of road as set forth in this location shall be in operation by said West Springfield and Agawam Street Railway Company, its successors and assigns, to pay said sum of Two Thousand Dollars ($2,000) and the accumulations to the Treasurer of said Railway Company, its successors, or assigns operating the said road. If, however, ten (10) miles of said road as set forth in

this location shall not be in operation by said Street Railway Company or its successors or assigns, in that event said trustees shall pay said Two Thousand Dollars ($2,000) and the accumulations to the Treasurer of the Town of Agawam, to be appropriated to such use as the said town by vote shall determine."

The attorney acting in behalf of the plaintiff presented a draft of the location asked for, containing the above condition. The special master who reported on the case, found that the selectmen had nothing to do with the drafting of the text of the order of location.

There was also pending before the selectmen a petition of the Springfield and Agawam Street Railway Company, known as "Dunham's petition", which asked for a location over about the same route set forth in the plaintiff's petition. A public hearing was held on both petitions, on the same day, and before any decision had been given by the selectmen, or action taken, an agreement between the parties interested in the plaintiff and the parties interested in the other company was made, whereby it was arranged that Dunham's petition for location should be dismissed, and that the plaintiff's petition for location should be granted, Dunham having acquired a controlling interest in the plaintiff company. The location was then granted to the plaintiff.

On December 7, 1898, the plaintiff deposited in the Pynchon National Bank of Springfield, Mass., $2,000 to the credit of "H. E. Bodurtha, J. H. Reed and R. M. Taylor, trustees, under terms of condition in location of West Springfield and Agawam Street Railway Co.", as called for in the order of location granted.

In February, 1899, the plaintiff asked for an amendment of the order of location. It was granted by the selectmen on February 27, 1899, and accepted by the plaintiff on March 6, 1899, and the deposit of $2,000 was made subject to all the terms and conditions of the original and amended location.

The master found, that the plaintiff never built its road; and that on or about November 15, 1898, an application by the plaintiff for a street railway location in West Springfield was denied. The plaintiff's projected railway, according to the description set forth in its articles of association, extended from a

point in the town of West Springfield, at the westerly end of the Old Toll Bridge across the Connecticut River, through a portion of West Springfield to the town of Agawam, and thence through Agawam to the State line of Connecticut, and also westward to Feeding Hills in Agawam. At the time the location was granted by the town of Agawam it was expected that a location also would be granted by the town of West Springfield to enable the plaintiff to carry its passengers to the city of Springfield.

The plaintiff offered evidence, to prove that the parties having a controlling interest in the Dunham petition had expended a large amount of money in grading, preparatory to constructing a street railway from Windsor Locks in Connecticut to the State line, at a point which was a terminus named in the two petitions for location in Agawam, and that these parties had a contolling interest in the road in Connecticut. The evidence, on objection of the defendants, was excluded, and the plaintiff excepted.

The Superior Court made a decree for the plaintiff enjoining the defendants, Henry E. Bodurtha, R. Mather Taylor and John H. Reed, from turning over to the treasurer of the town of Agawam the funds deposited in the Pynchon National Bank to the credit of the defendants as trustees, under the terms of the order of location to the plaintiff, dated October 28, 1898, and ordering them to execute to the Pynchon National Bank, or to the party holding the funds, their release of any claim thereto under the terms of the location recited in the bill. The defendants appealed.

The case was submitted on briefs at the sitting of the court in September, 1901, and afterwards was submitted on briefs to all the justices.

C. C. Spellman & C. F. Spellman, for the defendants.

H. C. Bliss, for the plaintiff.

BARKER, J. Under the location more than ten miles of railway could be built in Agawam alone. Therefore there is no ground for implying a condition that the plaintiff should be authorized to build outside of that town, and for the same reason the evidence excluded by the master was immaterial.

It is plain from the facts found by the master that the obligation to pay over the $2,000 was not one imposed by the select-

men at their own instance, and that such a payment was first suggested and offered by the plaintiff itself in asking for a location, and that the condition as incorporated in the grant of location was one drafted by their own attorney and was more than once accepted by the plaintiff. Under such circumstances the payment was not involuntary or constrained. See *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181, 188.

The plaintiff is in this position — If the condition was a proper one there is no reason why the plaintiff should have the money back. If it was against public policy the plaintiff can no more have the help of the courts to recover the money than to recover a bribe. It did not act under any necessity, but of its own voluntary choice, and in declining to aid in the recovery of money voluntarily paid against public policy the courts leave the plaintiff where it has seen fit to place itself.

Decree reversed and bill dismissed with costs.

CATHERINE KEARNS *vs.* SOUTH MIDDLESEX STREET RAILWAY COMPANY.

ANDREW J. KEARNS *vs.* SAME.

Middlesex. January 17, 1902. — June 18, 1902.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

Practice, Civil, Rulings. *Street Railway. Nuisance. Evidence*, Circumstantial, of negligence.

If a declaration contains three counts on one of which the plaintiff is not entitled to recover, and the defendant asks for no separate ruling on that count but asks for a general ruling that upon the evidence the plaintiff is not entitled to recover, the ruling should be refused if upon the evidence the plaintiff is entitled to go to the jury on either of the other counts.

In an action against a street railway company for injuries caused by an excavation in a highway between the tracks of the defendant, alleged to have been made and maintained by the defendant in the repair of its tracks contrary to the duty imposed by St. 1898, c. 578, § 11, with a count at common law for creating and maintaining a dangerous excavation in the highway, there was no testimony that any workman of the defendant was seen to make the excavation or that it was ordered to be made by any one in the defendant's service, but it appeared,

that before the ditch was made water ran from a point near the north rail to a switch of the defendant near by, carrying sand and gravel into the switch and impeding its operation, that the excavation started at the north rail and went toward the south rail connecting with a gutter beyond it, that it gradually deepened in its course from the north rail and presented the appearance of having been made by digging and not of having been washed out, and that while it was there employees of the defendant were at work upon the track replacing old ties with new ones within a few yards of the excavation. The defendant, although it introduced evidence, made no attempt to show that it did not cause the excavation to be made or by whom it was made, except by cross-examining one of the plaintiff's witnesses in regard to a hydrant near the excavation that had been repaired several weeks before the accident. *Held*, that this evidence justified a finding that the defendant made and maintained the excavation for its own purposes, and that there was evidence to go to the jury of the defendant's liability both under the statute and at common law.

TWO ACTIONS OF TORT, one by a married woman for personal injuries, the other by her husband for loss of her services and for expenses of nursing and medical attendance. Writs dated June 4, 1900.

In each declaration, the first count alleged, that the defendant was by law bound to keep in repair that portion of the highway lying between its tracks and negligently allowed that portion of the highway to be out of repair, whereby the injuries were caused and the damage suffered. Each second count alleged, that the defendant negligently prosecuted its work during the construction, alteration, extension, repair or renewal of its railway, and while replacing the surface of the street disturbed by such work, and by such negligence and misconduct produced and allowed to remain in the highway a deep excavation dangerous to travellers. Each third count alleged, that the defendant negligently and improperly created and caused or permitted to be maintained upon the highway a deep excavation dangerous to travellers thereon.

At the trial in the Superior Court before *Sherman*, J., the jury returned a verdict for the plaintiff in each case, in the first case in the sum of $1,000 and in the second case in the sum of $450, and also made the following special finding: "Was the alleged defect, between the track, made by the defendant's servants while in the construction, alteration or repair of its railroad? Answer. Yes."

The defendant alleged exceptions, which are explained by the court.

N. S. Myrick & J. A. Brackett, for the defendant.

G. L. Mayberry & J. J. Scott, for the plaintiffs.

BARKER, J. In each declaration there were three counts, and each verdict was a general one and may have been rendered upon either count. Without so deciding, we assume in favor of the defendant that upon the evidence neither plaintiff could recover upon the first count of his or her declaration. But no request was made for a separate ruling upon those counts. The three requests of the defendant were for general rulings that upon the evidence the plaintiffs were not entitled to recover; that under the provisions of St. 1898, c. 578, they could not recover, and that the actions should have been brought against the town and not against the defendant. Assuming in favor of the defendant that an exception was taken to the refusal to give these three requests and was intended to be saved by the bill, it must be overruled if upon the evidence the plaintiffs were entitled to go to the jury upon the second or the third counts. The distinctive allegation of the second counts is that the defendant in the repair of its railway negligently produced and allowed to remain in the highway a deep excavation dangerous to travellers. This count is founded upon the liability imposed upon street railway companies by the provisions of St. 1898, c. 578, § 11. That section requires the company to replace surface material disturbed by it in the making of repairs and to restore the street to as good condition as existed at the time of such disturbance, and makes the company liable for any loss or injury suffered by any person in the repair of its railway or while replacing the surface of any street so disturbed and resulting from the carelessness, neglect or misconduct of its agents or servants engaged in the work.

The third counts proceed upon the common law liability of any person who creates and maintains a dangerous excavation in a public way, and they allege that the defendant negligently created and caused or permitted to be maintained a deep excavation in the highway dangerous to travellers.

Although the evidence would not justify a verdict upon the first counts, the three requests were refused rightly if the evidence would justify a finding that the defendant made the excavation in the repair of its railway as alleged in the second counts,

or created the excavation and caused it to be maintained as alleged in the third counts. Although there was no testimony that any workman of the defendant was seen to make the excavation, nor that it was ordered to be made by any one in the defendant's service, we think the evidence justified a finding that the excavation was made and maintained by the defendant, and in the repair of its tracks.

It was in evidence that before the excavation was made water ran down near the north rail to a railway switch near by. The natural tendency of water so running would be to carry sand and gravel into the switch and impede its operation. The excavation started at the north rail and went towards and under the south rail and connected with a gutter beyond the south rail. It deepened gradually in its course from the north rail and it had the appearance of having been made by digging and not of having been washed out. While it was there employees of the defendant were at work upon the track replacing old ties with new ones within a few yards of the excavation. This would justify the inference that the excavation had been made for the purpose of diverting a flow of water from the defendant's switch, and as that would be serviceable to the defendant and to no one else that it was made by the party whose interest it would serve. Besides this the defendant although it introduced evidence made no attempt to show that it did not cause the excavation to be made, or by whom it was made, except to show by the cross-examination of one of the plaintiffs' witnesses that there was a hydrant south of the track near the excavation and that the hydrant had been repaired several weeks before the accident. It is matter of common knowledge that the motormen and conductors of a railway company, if no others of its servants, pass over and have the opportunity to observe its tracks daily. In the absence of any evidence introduced on the part of the company the evidence justified a finding that the company made and maintained the excavation for its own purposes. For this reason the three instructions stated were rightly refused.

The same considerations dispose of the refusal to rule that there was no evidence on which the plaintiffs could go to the jury upon the third count, and to the submission to the jury of the question, answered by them in the affirmative, whether the

alleged defect between the rails was made by the defendant's servants while in the construction, alteration or repair of its railway.

Exceptions overruled.

OWEN J. COLEMAN *vs.* LOWELL, LAWRENCE AND HAVERHILL STREET RAILWAY COMPANY.

Middlesex. March 5, 1902. — June 18, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Negligence, Contributory in driving.

A plaintiff who driving in a covered grocery wagon turned and drove at right angles across the tracks of a street railway in order to enter another street, and who testifies that as he turned his horse the car was coming toward him "quite fast" and was about one hundred feet distant from him, and that he judged it to be a safe distance away,* may be found to have been in the exercise of due care.

TORT against a street railway company for injuries from the collision of a car of the defendant with a covered wagon in which the plaintiff was driving on Central Street in Lowell. Writ dated May 14, 1901.

At the trial in the Superior Court before *Gaskill*, J., it appeared, that the accident occurred on March 12, 1901. The plaintiff was in the grocery business, and was driving home on the night of the accident, at about six o'clock in the evening, in a covered grocery wagon. It was then daylight. He testified, that he drove up the westerly side of Central Street and continued on the westerly side, going south until he came opposite to Warren Street, which runs at a right angle from Central Street in an easterly direction, when he turned his team and drove at right angles across the tracks of the defendant toward Warren Street; that when he was about two hundred feet from Warren Street he saw the car which subsequently struck his wagon coming toward him on the easterly track. At that time the car was about four hundred feet from Warren Street. He testified

* Cf. *Whitman* v. *Boston Elevated Railway*, *ante*, 138.

that he had the car in sight from the time when he first saw it until he turned his horse to cross into Warren Street. While crossing the tracks the horse he drove was walking. He then testified, that as he turned his horse toward Warren Street the car was coming toward him quite fast and was about one hundred feet distant from him; that he judged it to be a safe distance away; that when his team was at right angles to and was crossing the tracks, he was so far from the front of the team that the curtain hid the car from his view; that he then did not see the car again until he looked out around the curtain and saw that the car was approaching his wagon and was not more than twenty feet distant therefrom and coming fast; that he heard no bell or gong on the car at any time; that until that time the horse had been walking across the track; that then for the first time in crossing the track he attempted to make the horse go faster than a walk; that he was unable to get the wagon out of the way of the car. The car struck the rear of the wagon and threw the plaintiff out, and the wagon was carried along by the car to a distance variously stated at from fifteen to seventy-five feet.

One Martin, a witness for the plaintiff, testified, that when the plaintiff turned toward Warren Street the car was then all of seventy or seventy-five feet distant from the plaintiff's team.

Harry Ferguson, the motorman, testified, that the plaintiff crossed in front of his car about fifty feet northerly from Warren Street; that the plaintiff's team was then about sixty feet from the car, and the car was going not much faster than a walk; that the plaintiff before he had gone completely across the tracks turned his horse toward the car, thereby causing the accident. He stated on cross-examination that he could have stopped the car instantly if the rails had been dry; that at this time the rails were wet, and that under these circumstances he could have stopped his car within a few feet. The conductor was not called as a witness.

At the close of the evidence, the defendant asked the judge to rule that the action could not be maintained, and to order a verdict for the defendant. This the judge refused to do. The jury found for the plaintiff in the sum of $1,100; and the defendant alleged exceptions.

G. F. Richardson, L. T. Trull & F. N. Wier, for the defendant.

J. J. O'Connor, for the plaintiff.

BARKER, J. The only contention now made in support of the bill of exceptions is that the plaintiff was not in the exercise of due care. He testified without objection that he judged the car to be a safe distance away. There was conflicting evidence as to the distance of the car from the team when the plaintiff attempted to cross the track, and also as to the speed of the car. In our opinion the question whether the plaintiff was in the exercise of due care was for the jury.

Exceptions overruled.

ANGLO-AMERICAN LAND, MORTGAGE AND AGENCY COMPANY *vs.* BENJAMIN H. DYER.

Barnstable. March 6, 1902. — June 18, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Corporation, Foreign, assessment of shareholders. *Jurisdiction. Contract. Attorney. Accord and Satisfaction. Evidence*, Proof of foreign law, Burden of proof.

An action to recover an assessment on shares not fully paid can be maintained here by a foreign corporation against a stockholder resident in this Commonwealth.

The statute under which a foreign corporation was organized provided that the memorandum of association and the articles of association should bind each member to the same extent as if he had subscribed his name thereto and that all moneys payable by any member of the company in pursuance of any condition or regulation of the company should be deemed to constitute a debt due from such member to the company. The articles of association provided that the directors from time to time might make calls upon the members in respect of all moneys unpaid on their shares and that each member should pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. The certificates of shares contained a provision that the holders took them subject to the articles of association and the rules and regulations of the company. *Held*, that these various provisions created a valid and binding contract with the stockholders of the corporation to pay assessments for the amounts unpaid on their shares, which could be enforced against them in the courts of this Commonwealth or of any other State or country where service could be obtained upon them and jurisdiction over them acquired.

The memorandum of association of a foreign corporation contained the provision "The nominal capital of the company is £500,000, divided into 50,000 shares

of £10 each, of which the first issue shall be 25,000 shares, with power to increase such capital, and to issue all or any part of the original or increased capital at a premium or at a discount." *Held*, that one who subscribed for the shares of this corporation had waived the right, if otherwise he would have had it, to object that the whole fifty thousand shares had not been subscribed for and therefore that an assessment for the unpaid portion of the shares issued could not be enforced.

Where the shares of a corporation are liable to an assessment and the directors have power to make it, the necessity or wisdom of the assessment cannot be controverted, unless in case of fraud.

Whether an attorney at law has authority by virtue of his employment as such to agree without his client's sanction to a compromise of his client's suit, may be regarded as still an open question in this Commonwealth. Per MORTON, J.

The attorney of a corporation, whose shareholders were liable to an assessment made, arranged a compromise by which the shareholders were to be released on payment of a part of the amount assessed. This afterwards was rejected by the directors as *ultra vires* as to the creditors of the company. The money paid by the shareholders under the attempted compromise was returned to them. A shareholder thus receiving his money wrote to the corporation that he did not wish his money returned, as he was undetermined what to do, and that he held the money subject to the order of the company. But he kept the money. Later he resisted the payment of the full assessment on the ground, that a compromise had been made. *Held*, without considering whether the attorney had authority to make the compromise, that the attempted compromise was at most an accord without satisfaction, that the shareholder was bound by his acceptance of the return of the money in spite of his attempt to qualify his action, and also, that as to creditors at least the proposed compromise was *ultra vires*. *Whether* such a contract would be valid between the corporation and its stockholders if duly entered into and executed, was not considered.

Under Pub. Sts. c. 169, § 73, the law of a foreign country may be proved without authenticated copies if a witness who has examined the copy and compared it with the original testifies that it is correct.

Semble, that where one objects to the certificate of a public official that a company is incorporated, because it is not under an official seal, it is incumbent upon him to show that there is an official seal.

MORTON, J. This is an action to recover certain assessments made upon forty shares of the capital stock of the plaintiff company held by the defendant. The shares are of the par value of £10 each and the liability of the shareholders is limited to the par value. The assessments in suit amount to £6 per share, and assessments amounting to £2 per share had been previously paid by the defendant, — £1 when he bought the stock in 1884 and £1 on an assessment made in 1885. The exceptions set out all the material evidence. At the close of the evidence, the defendant requested certain rulings all of which except two were refused, and the jury were directed to return a verdict for the plaintiff. The case is here on exceptions by the defendant to

the ruling thus given, and to the refusal to rule as requested, and on exceptions to the refusal to make certain rulings that were requested during the trial. We shall consider only the exceptions that have been argued by the defendant, treating the others as waived.

Amongst the rulings requested and refused was one that on all the evidence the action could not be maintained and that a verdict be directed for the defendant. The plaintiff is a corporation organized under the companies' acts of Great Britain. The first question, and what is said on the defendant's brief to be the principal question, is whether assessments made by foreign corporations can be collected by such corporations in the courts of this Commonwealth of stockholders residing here. If the other grounds of liability are present, we see no objection to the maintenance of such an action against resident stockholders in the fact that the corporation seeking to collect the assessments is a foreign corporation. The liabilities of resident stockholders in foreign corporations have been recognized and enforced in numerous cases in the courts of this Commonwealth. It is unnecessary to do more than refer to the recent case of *Howarth* v. *Lombard*, 175 Mass. 570, where the authorities are collected and considered and where it was held that an assessment upon the defendant as a stockholder in a bank in the State of Washington could be collected here. The objection that the remedy is by a sale of the stock as has been held in regard to local assessments in various cases in this State, (*New Haven Horse Nail Co.* v. *Linden Spring Co.* 142 Mass. 349, 354, and cases cited,) is removed by the fact that the defendant has if not expressly at least impliedly agreed to pay to the plaintiff any assessments that might be made. In his application for the stock, which was in writing, he agreed to accept the shares that might be allotted to him "upon the terms of the prospectus and memorandum and articles of association" and authorized the insertion of his name upon the memorandum of association. The statute under which the corporation was organized and which must be taken to be a part of the contract between the defendant and the plaintiff, (*Howarth* v. *Lombard, ubi supra; Hutchins* v. *New England Coal Mining Co.* 4 Allen, 580,) provides that the memorandum of association shall bind the members of the company

"to the same extent as it would" if each member had subscribed his name and affixed his seal thereto and there were contained in it a covenant on his part and his heirs, executors and administrators to observe all the conditions of such memorandum. The statute makes similar provisions in regard to the articles of association, and further provides that "all moneys payable by any member of the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company." The articles of association also provide that "The directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on their shares, and each member shall pay the amount of every call so made on him to the persons, and at the times and places appointed by the directors." The certificate that was issued to the defendant provided that he took the shares "subject to the Articles of Association and the Rules and Regulations of the Company." The effect of these various provisions was we think to create a valid and binding contract between the defendant and the plaintiff company by which he became bound to pay to it such calls or assessments as the directors might make upon him from time to time in respect to the moneys unpaid on his shares, and which could be enforced against him in the courts of this State or of any other State or country where proper service could be obtained upon and jurisdiction acquired over him.

The defendant further objects that the capital stock had not all been subscribed for when the assessments were made, and that therefore, under *Katama Land Co.* v. *Jernegan*, 126 Mass. 155, and other cases decided in this Commonwealth the action cannot be maintained. The memorandum of association provides that, "The nominal capital of the company is £500,000, divided into 50,000 shares of £10 each, of which the first issue shall be 25,000 shares, with power to increase such capital, and to issue all or any part of the original or increased capital at a premium or at a discount," etc. Upwards of thirty-seven thousand shares have been issued. The provision quoted above formed a part of the contract between the defendant and the plaintiff company, and by agreeing that the first issue should be twenty-five thou-

sand shares with power to increase the capital the defendant has waived the right, if he would otherwise have had it, upon which we express no opinion, to object that the whole fifty thousand shares had not been subscribed for. There is nothing contrary to public policy in such an agreement. If the provision that the first issue should be twenty-five thousand shares be regarded as a stipulation that that number of shares must be subscribed for, then it appears, that the stipulation has been complied with. It is not necessary to consider whether it should be so regarded, or what would be the effect under the English law, which is the law that must govern this case of assessments made before the stipulated capital had been subscribed. See *Ornamental Pyrographic Woodwork Co.* v. *Brown*, 2 H. & C. 63; Lind. Comp. (5th ed.) 410.

The defendant further objects that there is nothing to show for what purpose the calls or assessments were made, or that any necessity existed for them in the condition of the company. These are matters which are not open to inquiry here. The necessity or wisdom of an assessment where it is within the power of the directors to make it, as it was here, cannot be controverted, at least in the absence of fraud, by the stockholders. *Oglesby* v. *Attrill*, 105 U. S. 605. 2 Thompson's Law of Corp. § 1710. Cook, Stock & Stockholders, § 113.

The defendant further contends that a valid and binding agreement of compromise had been entered into between him and the plaintiff company before the bringing of this suit in respect to the assessments sued for. The effect of his contention is and must be, though it is not so stated, that such agreement operates as a bar to the maintenance of this action. It appears that the attorneys of the plaintiff company made an offer of compromise which was accepted by the defendant for himself and others. The agreement was in substance that the defendant and those joining in it should be released from further liability for the assessments upon payment of one of the assessments, which was specified, with interest, and the payment of such further sums as on investigation should appear to be their proportion of the amount necessary to pay off the indebtedness of the company. The defendant paid to the attorneys the amount of the assessment agreed on and interest. The only

authority which the attorneys had to make the offer arose out of their employment as attorneys. Afterwards the board of directors was advised that the proposed compromise would be *ultra vires* as to creditors of the company, and was impracticable, and the defendant was so informed, and was asked whether the money that he had paid should be returned to him, or whether it should be retained and applied by the company towards the payment of the assessments that were due. In consequence of a letter received from him the money which he had paid for himself and others was returned to him. In acknowledging the receipt of the money he wrote that he did not wish what he had himself paid returned, as he was undetermined what to do, and that he held the money subject to the order of the plaintiff company. But he kept the money and nothing more has been done under the attempted compromise.

Whether an attorney at law has authority by virtue of his employment as such to agree without his client's sanction to a compromise of his client's suit out of court may be regarded as still an open question in this Commonwealth though it is said that the weight of authority in this country seems to be against such an authority. *New York, New Haven, & Hartford Railroad* v. *Martin*, 158 Mass. 313. *Dalton* v. *West End Street Railway*, 159 Mass. 221. *Lewis* v. *Gamage*, 1 Pick. 346. We do not find it necessary to consider or decide the question in this case. The attempted compromise was at the most an accord without satisfaction. *New York, New Haven, & Hartford Railroad* v. *Martin*, 158 Mass. 313, 315. *Herrmann* v. *Orcutt*, 152 Mass. 405. The defendant accepted the return of the money which he had paid, though attempting to qualify his action, and is bound thereby. It is clear also that, as to creditors at least, the proposed compromise was *ultra vires*. *Sawyer* v. *Hoag*, 17 Wall. 610. *Upton* v. *Tribilcock*, 91 U. S. 45. *Spackman* v. *Evans*, L. R. 3 H. L. 171. Whether such a contract would be valid between the corporation and its stockholders if duly entered into and executed we need not consider. *Sawyer* v. *Hoag*, 17 Wall. 610, 619.

The statutes of Great Britain were proved in the manner provided by Pub. Sts. c. 169, § 73. See *Frith* v. *Sprague*, 14 Mass. 455. It was not necessary that the copies should be authenticated. "A copy proved to be a true copy, by a witness who has

examined and compared it with the original" is admissible. 1 Greenl. Ev. § 488.

Certain other objections have been urged by the defendant such as that a retiring allowance was made by the directors to one Bennett, that one of the sections in the articles of association referred to "the scheme of arrangement of 1895" and that another section provided that the directors might exercise all the power conferred by "the Companies' Seals Act, 1864," and that there was no evidence of what the scheme of arrangement of 1895 was, or what the powers conferred by "the Companies' Seals Act" were. Neither of these objections seems to us to relate to matters that are shown to be material. It is also objected that the certificate of the registrar of joint stock companies that the plaintiff "was incorporated under the Companies' Acts, 1862 to 1880, as a limited company, on the thirty-first day of October, one thousand eight hundred and eighty-two" should have been excluded because not under the seal of that officer, and because there was no evidence that he had not an official seal. It would seem that if the defendant objected to the certificate because it was not under seal, it was for him to show that there was an official seal. But we do not think that the defendant was harmed or could have been harmed by the admission of the certificate. It sufficiently appeared from other evidence in the case that the plaintiff was a corporation.

We have considered the objections that have been argued by the defendant and the result is that we think that the exceptions should be overruled.

So ordered.

R. A. Hopkins & H. P. Harriman, for the defendant.

O. Powell (of New York), for the plaintiff.

JUNIUS B. GOULD *vs.* WILLIAM GILLIGAN.

Suffolk. March 7, 1902. — June 18, 1902.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

Practice, Civil, Charge.

In an action for injuries caused by horses attached to a cart running away and striking the plaintiff, the counsel for the plaintiff in his argument assumed in accordance with the testimony of the eye-witnesses that the driver was at the tail of the cart when the horses started, and the judge in charging the jury made the same assumption. At the end of the charge the counsel for the plaintiff objected to this assumption and asked the judge to call the jury's attention to the contention of the plaintiff that the driver was not by his cart when the horses started. The only evidence from which the absence of the driver in any way could be inferred was testimony that the driver did not appear on the scene of the accident until fifteen or twenty minutes after it occurred, the place being eight hundred and fifty feet away from where the horses started. The judge refused to charge as requested. *Held*, that the judge was justified in refusing to suggest a new argument in behalf of the plaintiff at the end of the charge especially as there was the merest scintilla of evidence on the subject if there could be said to be any at all.

TORT for personal injuries. Writ dated November 27, 1896.

At the trial in the Superior Court before *Blodgett*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which, after the resignation of *Blodgett*, J., were allowed by *Bell*, J.

E. Lowe, for the plaintiff, submitted a brief.

W. G. Thompson, (*H. F. Hurlburt* with him,) for the defendant.

HOLMES, C. J. This is an action of tort for personal injuries caused by the running away of a pair of horses with a cart belonging to the defendant and their striking the plaintiff. All the evidence from eye-witnesses as to how the horses came to run away showed that the driver was at the tail of the cart when the horses started, and that they were suddenly frightened by a barrel being rolled against their heels by a boy. There was no evidence that the driver was not there unless by a remote and uncertain inference from the testimony of some witnesses that he did not appear for fifteen or twenty minutes upon the

scene of the accident, which was eight hundred and fifty feet away from the point from which the horses started. Naturally upon such evidence the argument for the plaintiff said nothing about the driver's being away from his horses, but was directed to the way of leaving the reins, to the failure to see the barrel more quickly, and so forth. Naturally also the court in its charge followed the course of the argument and instructed the jury upon the aspects of the case which had been discussed. But at the end of the charge the counsel for the plaintiff objected that the judge had assumed that the driver was by his cart when the horses started, and requested him to call the jury's attention to the position that the driver was not by his cart at that time. The only exceptions are to the refusal of the court to do as requested and to the charge as assuming that the driver was by the horses. The charge left it entirely open to the jury to find that the driver was away, and assumed nothing more than the argument did. If after hearing it the plaintiff's counsel regretted that he had not adopted a different line, or for the first time thought of the possibility of putting his case upon a new ground, he was too late and could not call upon the court to help him. Especially was the judge justified in declining to put forward for the first time at the end of his charge a view of the case for which there was but the merest scintilla of evidence, if it fairly could be said that there was any evidence at all.

Exceptions overruled.

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1. An assignment to a bank of certain property, executed by W. and his wife, to secure their joint and several note for $4,500 contained the words "This assignment is voluntary on our part and shall remain in full force until all the indebtedness of said W. to the said bank shall have been paid." Later the note was renewed by a like joint and several note for $5,000 including another loan of $500, and upon the new note was a statement that it was secured by the property assigned. Between the making of the original note and the renewal W. borrowed an additional $2,300 from the same bank, giving his personal note with the indorsement of a third person. After a part payment on this note, a like note for $2,000 similarly indorsed was given for the balance due. Neither of the last named notes mentioned the assignment. *Held*, that by the language used in the assignment it was not intended to give the bank a lien for all possible future indebtedness, and that the note for $2,000 was not entitled to share in the security of the assignment. *Nashua Savings Bank* v. *Abbott*, 531.

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2. Where the maker of a promissory note has made a voluntary assignment for the benefit of creditors, and the holder of the note on receipt of dividends amounting to sixty-seven per cent of his claim gives the trustee a release of all demands against him, this does not release the maker from his liability for the unpaid balance of the note, and the liability of a surety on the note is diminished only so far as he may have suffered loss by the release. *Boston Penny Savings Bank* v. *Bradford*, 199.

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ATTACHMENT.

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1. Real estate was attached as the property of John Kavarik. There was no such person, and the owner's true name was John Kovarik. There was no fraud or attempt to conceal the attachment, and John Kovarik had actual notice of the service of the writ upon him. He did not plead the misnomer in abatement. *Held*, that on these facts the attachment could be found to be good against one who purchased the land without notice of it. *Norris* v. *Anderson*, 308.
2. Amendments to cure mere defects in form or clerical errors do not affect attachments. To dissolve an attachment or make it ineffectual as against a subsequent attaching creditor, purchaser or surety, the amendment must be such as to let in some new demand or cause of action. *Ibid.*
3. Amending a writ by changing the name of the defendant from John Kavarik to John Kovarik, does not dissolve an attachment previously made on the same writ upon real estate of the defendant described as property of John Kavarik. *Ibid.*
4. A description of land in an attachment is good if it would be sufficient to pass the land in a grant by the owner. *Ibid.*

Of Personal Property.

5. In an action against a deputy sheriff for attaching personal property on a milk farm conducted by the plaintiff, a married woman, the plaintiff had given notice to the defendant under Pub. Sts. c. 161, §§ 42, 43, to remove the property without delay. The officer removed it to a certain barn, and the plaintiff contended that this removal was not good in law because the barn was on her premises. The defendant's return stated, that he had removed the property to a place of safe keeping, and he testified that the barn belonged to and was occupied by one H. the owner of the farm. The plaintiff's husband testified, that he managed the milk business for his wife and hired the farm including the barn. *Held*, that there was no

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1. In the absence of any evidence of usage of trade or facts of the particular case to bring it within St. 1898, c. 533, § 193, a demand on a promissory note payable on demand must be made within sixty days of the date in order to hold an indorser. *Semble*, that if there is any such usage or any fact or circumstance to excuse a delay in making the demand, the burden is on the holder to show it. *Merritt* v. *Jackson*, 69.
2. In the words "For deposit in the National Bank of Florida, to credit of E. J. Neher," written on the back of a note, the name is none the less a signature and an indorsement because it makes part of a sentence. *Haskell* v. *Avery*, 106.
3. If the holder of a note payable in Boston indorses it for deposit to his credit in a bank in Florida, this gives the Florida bank the legal right to the note and the right to collect it and authority to indorse it for collection. The fact that the words "or order" were not added to the indorsement for deposit does not limit the power of the bank to indorse for collection. *Ibid.*
4. The indorsement, on a draft payable in Boston and sent from Florida for collection, by a New York bank "for [its] collection account" does not prevent the holder of the draft from suing on it or proving it before commissioners in his own name. *Ibid.*
5. A ruling, that the maker and indorser sued on a promissory note must establish the fact that the plaintiff took the note without paying value for it before they can show fraud in the inception and delivery of the note, is wrong. The reverse is correct, that upon proof that a note was obtained or put into circulation by fraud, the indorsee, in order to recover, must show that he gave value for it in good faith before maturity. *Savage* v. *Goldsmith*, 420.

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As to what if any loss suffered by surety of note from holder's release of assignee for benefit of creditors of maker, see SURETY.

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BOARD OF HEALTH.

St. 1894, c. 491, § 18, providing for the granting of licenses to slaughter houses by the mayor and aldermen of cities and the selectmen of towns, or such other board of officers as they shall designate, does not take away the power of the board of health of a city under Pub. Sts. c. 80, § 84, to forbid the carrying on of a slaughter house as dangerous to the public

CAPITAL AND INCOME.

The stockholders of a coal company, the par value of whose shares was $50, accepted an offer of $276 a share for all their stock with an arrangement that the purchase should not include a surplus called "treasury assets," which was to be liquidated and distributed to the stockholders of record on a certain day as an extraordinary dividend. These assets besides cash, coal and accounts receivable included $3,000,000 of railroad bonds used as working capital. The dividend was declared by the directors as "representing accumulated and undivided profits of the company." The total amount of the dividend was between two and three times as much as the par value of all the capital stock. On a bill for instructions by a trustee under a will, to determine whether the dividend should be treated as capital or income or as in part capital and in part income, it was *held*, that the directors treated the assets as income and properly could do so, and that the dividend was one wholly of income. *Hemenway* v. *Hemenway*, 406.

CARRIER.

1. The holder of a ticket entitling him to a round trip on an excursion steamer has no right of action against her proprietor for being left behind by reason of the boat starting on her return trip before the advertised time, if the government inspector had refused to allow any more passengers to go on the boat. *Hughson* v. *Winthrop Steamboat Co.* 325.
2. In this case it was assumed, that a postal clerk, who had paid no fare, unloading mail in a postal car, which recently had been detached from a train on its arrival at its final station and was standing on a side track, had originally and still had the rights of a passenger. *Stoddard* v. *New York, etc. Railroad*, 422.

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For conspiracy to procure and abet illegal voting at caucus, see CONSPIRACY, 1–4; PLEADING, CRIMINAL, 1–5.

CERTIORARI.

1. A writ of certiorari can issue only to correct errors of law apparent on the face of the record when properly extended. A respondent may be allowed to show by matter outside the record that justice requires the refusal of the writ, and if he does so the petitioner may reply to such extraneous facts, but he can do no more. *Ward* v. *Newton*, 432.

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1. Those provisions of the election act, St. 1898, c. 548, which regulate caucuses and voting at them are constitutional. *Commonwealth* v. *Rogers*, 184.
2. The provision of St. 1898, c. 548, § 91, that no person having voted in the caucus of one political party shall be entitled to vote or take part in the caucus of another political party within the ensuing twelve months, is valid. *Ibid.*
3. St. 1898, c. 548, § 92, requiring voting lists to be used as check lists in balloting at caucuses, is valid. *Ibid.*

Remedial Statutes.

4. The constitutional provisions for the protection of property allow a certain limited degree of latitude in regard to the restoration of remedies that have been extinguished by lapse of time when the seeming infraction is not very great and when justice requires relief. On this principle, St. 1899, c. 386, extending until January 1, 1900, the time for filing petitions for damages from changes of grade made under the Boston terminal company act, St. 1896, c. 516, was held to be constitutional. The doctrine of *Campbell* v. *Holt*, 115 U. S. 620, was not passed upon. *Dunbar* v. *Boston & Providence Railroad*, 383.

Obligation of Contracts.

5. St. 1895, c. 293, providing that, when a railroad corporation is held liable for injury to property by fire communicated by its locomotives, it shall have the benefit of any insurance money received by or payable to the owner of the property, is applicable to all such fires occurring after it took effect, whether the policies of insurance were issued before or after its enactment. The statute thus applied does not impair the obligation of the contract contained in the Massachusetts standard form of policy, that "whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers." The assured only agrees to give the insurance company such rights to reimbursement as he may have at the time of the fire, and does not agree to have any such rights. LORING, J. dissenting, on the ground, that St. 1895, c. 293, does not undertake to modify the liability of railroad companies for fires communicated by their locomotives,

but undertakes to transfer to the railroad company the abutter's insurance leaving the liability of the railroad company untouched; and that as to policies containing the subrogation clause issued before its enactment, the statute is of no effect, because it attempts to impair the obligation of contracts by applying the fund created by a policy which stipulated that it should not enure to the benefit of the railroad company toward the extinguishment of the liability of that company. HOLMES, C. J. & HAMMOND, J., also dissenting. *Lyons* v. *Boston & Lowell Railroad*, 551.

CONTRACT.

Consideration.

1. A contract that, if the plaintiff, a widow, would deliver to the defendant, her father in law, the clothes, watch and other property of her late husband and would assent to the appointment of the defendant as administrator of his estate, the defendant would pay the plaintiff $1,000, when it has been wholly performed on the part of the plaintiff, furnishes a good consideration for the defendant's promise. *Gunther* v. *Gunther*, 217.

As to consideration for certain oral agreement in regard to real estate, see TRUST, 1.

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Validity of contracts to buy or sell securities with no intention of delivery, see WAGERING CONTRACTS, 1–4.

Agreement not to sue under St. 1890, c. 437, relating to wagering contracts, invalid, see WAGERING CONTRACTS, 5.

Construction.

2. An agreement by one owning a patent "to fully protect" a manufacturer making patented articles for him "from any suits on account of patents" does not call for a bond with a surety. *National Machine, etc. Co.* v. *Standard, etc. Co.* 275.

3. The plaintiffs were commission merchants in Boston selling lemons upon a commission as agents of a Malaga house. Having procured from the defendants an order for Malaga lemons, they sent them a contract in writing addressed to the defendants and signed by the plaintiffs as follows: "We confirm sale made to you viz. [terms of sale.] Shipment about 20th inst. In our cable to Messrs. G. & Co. we stated that quality must be strictly choice and free from spots. It is understood that we act simply as agents in this transaction, and that all risks incident to the importation are yours and not ours. Payment net cash on arrival." The plaintiffs, having a letter of credit with G. & Co., allowed G. & Co. to draw on them for the price of the lemons to be repaid to the plaintiffs by the defendants on the arrival of the lemons. Upon arrival the lemons were not in accordance with the contract and the defendants refused to take or pay for them. They were sold at auction, and the plaintiffs sued for the difference between the sum realized and the stipulated price, as expenses of importation paid by the plaintiffs to the defendants' use.

Held, that the rights of the parties must be adjusted by the contract in writing, and that by its terms the plaintiffs were not agents of the defendants nor lenders to them of funds equal to the contract price, and that the only obligation of the defendants was to pay for the lemons if on their arrival they were in accordance with the contract. The "risks incident to the importation" which were to be borne by the defendants did not include the risk that the lemons when sold in Malaga should not comply with the description in the contract. *Maynard* v. *Weeks*, 368.

Of contract as entire and therefore not to be affirmed in part by infant on coming of age without ratifying whole, see INFANT, 2.

Of contract to exploit patent through corporation, see EQUITY JURISDICTION, 14.

Of fraternal beneficiary certificate, see FRATERNAL BENEFICIARY ASSOCIATION.

Of contract for sale of goods where time of payment not stated, see EVIDENCE, 15.

Of vote of statutory commissioners allowing tenant at sufferance to occupy premises on certain terms, see LANDLORD AND TENANT, 4.

Of assignment for security, see ASSIGNMENT, 1.

Contract to light streets not lease of lanterns used by contractor, see TAX, 6.

Performance and Breach.

4. The plaintiff undertook to manufacture for the defendant certain parts of a patented machine the making of which involved considerable expenditure, on condition that the articles should be shipped as finished and the bills be settled promptly as they came to the defendant and that the defendant should arrange that the bills should be approved promptly and payments made on them at once so that the plaintiff might not have "too large an amount of money tied up on the work." The plaintiff, having finished one item on the defendant's order, sent a bill for $90 stamped "all claims for corrections in this bill must be made within ten days from date." Three or four days later the plaintiff asked for payment, complaining at the same time of another overdue account for nearly $700. The defendant's representative apologized and explained the delay as accidental. There were further complaints and explanations until the eleventh day, when the defendant's representative stated that the check was ready, but had been retained for entry as the bookkeeper was away. This afterwards turned out to be true, but on the twelfth day the check did not arrive, and the plaintiff gave notice, that the defendant having broken the contract he should stop all work under it, and did so. *Held*, that, although the defendant had not repudiated the contract, there might have been such a breach of it by an honest failure to pay as would warrant the plaintiff in a refusal to go on with the work; and that a finding was warranted, that the defendant's failure to pay the $90 promptly was a breach going to the root of the contract which justified the plaintiff in refusing further performance and resorting to his right of action. HOLMES, C. J. & LORING, J. *doubting*, on the last point, in view of the smallness of the sum, the indefiniteness of the terms of the contract as to the time for payment,

the shortness of the delay, and some other circumstances. *National Machine, etc. Co.* v. *Standard, etc. Co.* 275.

Acceptance of substituted performance of contract, see SALE.

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5. One who has enjoyed for ten months the privilege of conducting a restaurant in connection with the bar room of another under an agreement with the proprietor of the bar room giving him such privilege for two years, if the proprietor turns him out in violation of the agreement, cannot rescind the contract and recover back the payments made under it, because he cannot return the benefits he has received. *DeMontague* v. *Bacharach*, 256.

6. The defendant, a promoter of electric lines with certain projects on hand, employed the plaintiff, an electrical engineer, at the rate of $2,500 a year to perform professional services in regard to certain of these projects one of which might require six months and another a year, the plaintiff mentioning at the time of his employment, that he already had undertaken to make a certain report which would require him to be away at a certain time for about a week. Later the plaintiff notified the defendant that he should have to go away for a little while to complete the report mentioned, whereupon the defendant wrote to him that if he intended to go "it would be better to take a leave of absence without pay for thirty days," as that would give him sufficient time to make his report without interfering with the defendant's business. The plaintiff informed the defendant that he did not consider the proposition in accordance with their agreement, but did not remember what answer the defendant made to this. The plaintiff went away, made his report and returned at the end of five days. He then had conversations with the defendant in regard to the work and expressed a willingness and desire to go on with it, but the plaintiff testified, that at this time the defendant still considered him on leave of absence. Later the plaintiff sued on an account annexed for services during this period, having been paid in full up to the time of his absence. *Held*, that as no definite time or no definite task was fixed by the contract, the defendant's insisting that the plaintiff's stipulated absence should take the form of a leave of absence without pay, if a breach of the contract, could not be treated by the plaintiff as a repudiation of it, and, even if it could have been so treated, the plaintiff had failed to exercise an election to rescind if he ever had it. *Forbes* v. *Appleyard*, 354.

Implied Contract: Common Counts.

7. One cannot recover for money paid and labor performed under an oral agreement within the statute of frauds without showing that the contract was unenforceable by reason of the defendant setting up the defence of the statute. *DeMontague* v. *Bacharach*, 256.

8. The plaintiff conveyed certain land to the defendant under an oral agreement, by which the defendant agreed to pay off a certain mortgage thereon, and, on the plaintiff paying him the amount paid on the mortgage and $150,

to reconvey the land to the plaintiff. An agreement to reconvey was drawn up and the defendant said he was satisfied with it, but, after he had obtained the deed from the plaintiff, he refused to sign the agreement and did not offer to sign any paper, and sold and conveyed the land to the mortgagee. *Held*, that these facts would warrant a jury in finding, that the defendant deliberately broke his promise to sign the agreement on the ground that it was not enforceable, and, if so, a right of action at once accrued to the plaintiff to recover the value of the property he had parted with. If the right of action did not accrue until the defendant sold the land, it would be a question for the jury whether the plaintiff had failed in the performance of any conditions precedent before that time. After the sale, the plaintiff was not obliged to do anything. *Peabody* v. *Fellows*, 26.

9. In an action on a note for $500 payable in two years from date, the defendant declared in set-off for $381 had and received as "discount on milk at four cents per can," and offered to show an oral agreement made at the time the note was given whereby the defendant was to buy milk of the plaintiff paying twenty-eight cents a can and the plaintiff was to allow the defendant a discount of four cents a can when the note was paid. The evidence was excluded. *Held*, that the exclusion was right. The four cents a can rebate stipulated for by the oral agreement could not be recovered in any event, since such recovery would involve the enforcement of a contract within the statute of frauds where the statute had not been complied with; and the only ground on which anything could be recovered under the declaration in set-off would be, that the oral contract was repudiated by the plaintiff because incapable of proof by reason of the statute of frauds, and that the defendant under it had paid the plaintiff more than the market value of the milk, the excess being paid for something which the defendant had not received. There having been no offer to show that twenty-eight cents was more than the market value of a can of milk, there was no ground for admitting the evidence offered. *Kelley* v. *Thompson*, 122.

10. By a contract in writing the plaintiff agreed to perform all the labor necessary for the erection of certain plumbing fixtures in the house of the defendant for a sum named, and to supply all the materials used at an advance of ten per cent over the cost of the stock. An auditor found that the plaintiff had performed the terms of the contract, but that most of the prices charged for the materials were excessive and not justified by the contract, and restated the account changing the prices as required by the evidence. The judge found the facts to be as stated by the auditor and found for the plaintiff. The defendant contended that the plaintiff could not recover on the contract, but only on a common count under which he must prove that his work benefited the defendant, and that he could recover only the increased market value of the defendant's house by reason of his work in accordance with the rule in *Gillis* v. *Cobe*, 177 Mass. 584. *Held*, that the rule in *Gillis* v. *Cobe* did not apply to the case, as the plaintiff had performed his contract. *Craig* v. *French*, 282.

11. An assignor of a lease, who has been compelled by the lessor to pay the

rent, has a right of action against his assignee, under seal, in the nature of the claim of a surety for money paid to the defendant's use, and the statute of frauds has no application. *Collins* v. *Pratt*, 345.

12. In an action for personal services by an unmarried woman against her brother, it appeared, that for a time she lived with him as his housekeeper for pay, and that he then fell ill and she kept on for many years, receiving no pay, but on the contrary earning money outside which she used for the support of the defendant and his children. *Held*, that whether the defendant expected to pay for the services or not was immaterial, and that it was not necessary, in order to bind him, that he should have believed that the plaintiff expected pay, if when he accepted the services he should have understood from what he knew that such was the expectation. *Spencer* v. *Spencer*, 471.

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CORPORATION.

By-Laws.

1. In an action against a corporation for an alleged conversion of the plaintiff's shares of stock therein by refusing to issue a certificate to the plaintiff, it appeared, that the following was a by-law of the corporation, which was printed upon its certificates of stock: "No stockholder shall sell or otherwise dispose of the whole or any part of his stock unless he shall, at least thirty days previous thereto, have offered in writing to sell the same to the board of directors upon the same terms and for the same price as he shall have been offered by his prospective purchaser, and such offer to said directors shall not have been accepted within that period." The shares in question had been transferred to the plaintiff by a stockholder without first offering them to the directors or otherwise complying with the by-law. *Held*, that the by-law was lawful, at least between the plaintiff and

Foreign Corporations.

As to taxation of property of foreign corporation "leased for profit," see TAX, 6.

No jurisdiction to determine validity of election of directors of foreign corporation, see JURISDICTION, 2.

Stockholders may maintain bill in equity against directors of foreign corporation doing business here to enjoin them from doing business *ultra vires* and to compel them to account for property of corporation misappropriated by them, see EQUITY JURISDICTION, 13.

Statute of limitations does not run in favor of foreign corporation which could not be sued in Massachusetts, see LIMITATIONS, STATUTE OF, 1.

Whether certain dividend of corporation was capital or income, see CAPITAL AND INCOME.

COSTS.

Taxation of and appeal therefrom, see PRACTICE, CIVIL, 4.

When witness entitled to fee, see WITNESS, 4.

R. L. c. 156, § 13, in regard to double costs, probably not applicable to case coming up on report, see PRACTICE, CIVIL, 9.

CURTESY.

Right of tenant by the curtesy initiate an insurable interest, see INSURANCE, 1.

DAMAGES.

For Property taken under Statutory Authority.

1. In the assessment of damages for land and flats taken under statutory authority, the presiding judge may in his discretion admit evidence of what a substantial sea wall on the premises is worth by the running foot, the jury being instructed that the market value of the property taken is the thing ultimately to be arrived at. *Stone* v. *Commonwealth*, 438.
2. In the assessment of damages for land and flats including a wharf taken under statutory authority in 1893 and 1895, evidence may be admitted under St. 1898, c. 535, of a declaration of a deceased lessee of the wharf who occupied it from 1856 to 1882, that it would be safe to guarantee from eighteen to twenty feet of water there at flood tide. In view of the lessee's long use of the wharf his statement fairly might be taken to import that as a result of experience he had found there the depth of water stated, and the court could not say that the time referred to was too remote. *Ibid.*
3. At a trial for the assessment of damages for land and flats including a wharf and berth for vessels taken by the Commonwealth under a statute and for damage to the petitioners' remaining land not taken, the Commonwealth contended that a new berth for vessels could be made by dredging and the damage to the remaining land thus diminished. To

which the petitioners replied that they did not own the flats that would have to be dredged. In order to show that the petitioners had a right to dredge the flats, the Commonwealth offered in evidence a finding of a single justice of this court, in another case, to which the petitioners were parties and the Commonwealth was not a party, tending to show that the petitioners possibly had some title to the flats to be dredged. This was excluded. The Commonwealth also offered, for the same purpose, to show that the counsel who acted in the other case for some of the petitioners in this case argued and tried to prove in the other case that the flats to be dredged belonged to those petitioners. This also was excluded. *Held*, that the exclusions were right. *Whether*, the petitioners had in fact a right to dredge the flats required for the new berth, *quære*. *Stone* v. *Commonwealth*, 438.

Reasons for price at which adjoining property sold may be excluded as raising collateral issue, see EVIDENCE, 24.

In Tort.

For unlawful exclusion from school, see SCHOOL, 3.

For elements of damages recoverable and also as to mitigation of damages in action for libel, see LIBEL AND SLANDER, 4, 5.

Mitigation of damages in action in nature of trespass *quare clausum* against cotenant, see JOINT TENANTS AND TENANTS IN COMMON, 2.

Evidence as to condition of premises relevant on question of damages for failure of landlord to repair, see EVIDENCE, 3.

DECEIT.

In an action of tort for inducing the plaintiff to hire a certain tenement by false representations of the defendant's agent that the drainage was in good condition, the plaintiff objected to the charge to the jury as instructing them that in order for the plaintiff to prevail the representations must have been the sole inducement to the contract of hiring. *Held*, that, properly interpreted, the judge's charge meant, that the representations must have been one of the inducements, and so interpreted was right. *Harrington* v. *Douglas*, 178.

DEDICATION.

As to right acquired by dedication to light, air and prospect, see EASEMENT, 2, 3.

DEED.

Construction.

1. The description in a deed of a rear lot as "an enlargement" of a front lot on a city street previously conveyed does not annex to the rear lot the easements appurtenant to the front lot. *Crocker* v. *Cotting*, 146.
2. At the time of his death W. owned an undivided half of certain land in Falmouth, the other undivided half being owned by L., one of his sons.

Deed (*continued*).

The heirs at law of W. and the devisees under the will of another of his sons, each executed a deed conveying to L. "All my right, title, and interest to certain real estate situate in Falmouth aforesaid, as contained in the last will and testament of W., late of Falmouth, made and signed the 18th day of November, 1859; it being the eighth and last item of that will, which reads as follows: '8th. I give and bequeath to my son L. the use, income, and improvement of all my real estate during his natural life, and at his decease, to my children and to the issue of any deceased child.'" *Held*, that all the interest which the grantors had in the land passed by these deeds, whether acquired by inheritance from W. or as devisees under his will or under the will of his deceased son. *Eldred* v. *Davis*, 498.

Delivery.

3. Where a loan is to be made upon a mortgage, and a time is appointed for passing the papers, and the mortgage and note are handed to the mortgagee's lawyer and remain in his custody for a day before the time fixed for passing the papers, there is no delivery in the technical sense until that time arrives, and an alteration in the mortgage note made before the papers are passed is made before delivery. *Nichols* v. *Rosenfeld*, 525.

Registration.

4. The recording of a deed is not constructive notice to one having an antecedent interest in the land conveyed. *Dixon* v. *Smith*, 218.

As affected by prior attachment under wrong name, see ATTACHMENT, 1.
Validity, as against widow, of deed made by husband for purpose of depriving her of share in his estate, see HUSBAND AND WIFE.

DEVISE AND LEGACY.

Construction.

1. A will provided that on the death of the testator's two children the property should be divided equally among his grandchildren. Then came the clause "That portion of my property when divided is to apply in trust for the benefit of my granddaughters then living," followed by a clause about grandsons. *Held*, that the ambiguous words "apply in trust," if they could be given any meaning, created at most a dry trust, under which the grandchildren were entitled to immediate distribution on the death of the testator's children. *Russell* v. *Bates*, 12.
2. A testatrix began her will by declaring her intention of disposing of her whole property. She then created a life estate in her whole property, divided the remainder into two equal parts, and fully provided for the final disposition of the first part. She then provided, that the other half should be equally divided among six nephews and nieces named, and added "the sum I bequeath to William Salisbury and the sum I bequeath to Sam Salisbury I wish put in trust to Elihu Chauncey and they should have the income only." The persons thus named were two of the six. *Held*, that the bequest to "Sam Salisbury" was an absolute gift, subject to the pro-

6. On an appeal from a decree as to the interpretation of a will and codicil, it appeared, that the original will, after various gifts to other persons, gave to the appellant an interest in certain real estate and $5,000 in money. After other gifts, the rest and residue of the estate was given to four persons, of whom the appellant was one, in equal shares. The codicil was made four years later. It recited that by his original will the testator had given the appellant one fourth of the residue and the sum of $5,000, and, revoking this gift, gave to trustees one fifth of the residue and $5,000, to pay the income to the appellant during her life and at her death to distribute the trust property as therein provided. Then, after other changes, the testator revoked the residuary clause in his original will, which divided the residue among four persons of whom the appellant was one, and instead divided it among five persons of whom the appellant was one. The appellant contended, that she was entitled, first to a life estate in one fifth of the residue, and then to one fifth of the remaining residue outright. *Held* that she was not so entitled; that the provisions of the will and the two provisions of the codicil in regard to the appellant must be taken together, and so construed there was only one residue, one fifth of which was to go to trustees for the benefit of the appellant during her life. *Dunbar* v. *Dunbar*, 236.

7. The residuary clause of a will gave the residue to trustees to hold until January 1, 1901, and to pay the income, one quarter in reduction or payment of any mortgages on the testator's real estate, one quarter to his widow, and the remaining one half to four children named and their issue, and, after all the mortgages had been paid and discharged, to pay one third of the income to the widow during her life, "or until January 1, 1901, should she so long live," or if she died before that day to the four children named, and the remaining two thirds of the income "until January 1, 1901," to the four children named and their issue, and "on the first day of January, 1901, or upon the full payment of all such mortgages should that occur at a later date, to pay over and convey the trust estate," in case the widow had died, to the four children named. The testator died February 8, 1894. On January 1, 1901, the widow had died, and a portion of the mortgages remained unpaid. On a bill for instructions, the question was raised, whether the trust created by the residuary clause was void, because the time for distribution might occur beyond the limit allowed by the rule against perpetuities. *Held*, that by the true construction of the clause no question of violation of the rule against perpetuities arose, as the trust terminated on January 1, 1901; that the provision that the distribution of the principal should take place on January 1, 1901, "or upon the full payment of all such mortgages should that occur at a later date" did not extend the period beyond the date named, but meant that if on that date, when the accumulation of income to pay the mortgages ended, the mortgages had not been paid, they should then be paid out of the principal, and the balance distributed among the persons named. *Batt* v. *Henderson*, 1.

Jurisdiction to set aside devise as being secret trust for illegal purpose and fraudulently procured, see EQUITY JURISDICTION, 10, 12.

DISCRETION OF COURT.

DIVORCE.

DOMICIL.

EASEMENT.

ELECTIONS.

EMPLOYERS' LIABILITY ACT.

EQUITY JURISDICTION.

Bill for Instructions.

3. The executor under the will of one who was the executor and residuary legatee under the will of another has no *locus standi* to maintain a bill for instructions as to whether his testator as residuary legatee under the earlier will took absolutely or only for life. *Nickerson, appellant*, 571.

To enforce Lien.

4. Where a seat in the Boston stock exchange was assigned to a bank by a member to secure his note, and after his death the seat was sold under the rules of the exchange and the balance of the proceeds paid to the administrator of his estate, notice of the assignment having been given by the bank both to the exchange and the administrator, it was *held*, that the bank's lien could be enforced by a suit in equity against the administrator who held the proceeds of the sale subject to the lien, and, having in his hands more than enough to discharge it, he could be ordered to pay the required sum to the plaintiff. *Nashua Savings Bank* v. *Abbott*, 531.
5. One having a lien on certain property of a person deceased insolvent created by an assignment securing a note of the deceased, does not lose his lien by failing to sue on the note or to prove it before the commissioners within the two years fixed by the special statute of limitations, or by an attempt afterwards abandoned to enforce his claim on the note in equity under Pub. Sts. c. 136, § 10. Neither the debt nor the lien are affected by these things, and, if the assignee has been guilty of no laches in insisting on his lien, he can enforce it in equity against the property, or against its proceeds in the hands of one holding them with notice of the lien. *Ibid.*

See also STOCK EXCHANGE.

To enjoin Action at Law.

6. A bill in equity will not lie to restrain the prosecution of an action that is groundless and malicious, as in that case there is a perfect defence at law. *Corey* v. *Griffin*, 229.

Bill to reach and apply.

7. One holding a judgment against a building contractor, who has become bankrupt, for injuries received through the negligence of one of his workmen, cannot maintain a bill in equity to reach and apply the insurance money from a policy held by the contractor against such accidents, if before the bill was filed the insurance company had paid the contractor a sum of money in final settlement of its liability in good faith and without knowledge of the contractor's financial condition. *Whether*, if the bill had been filed before the payment and while there was an existing obligation from the insurance company to the contractor, the plaintiff could have compelled the application of that obligation to the satisfaction of his claim, was not considered. *Bain* v. *Atkins*, 240.

To recover forfeited Deposit.

8. A street railway company asked a town for a location, and presented a draft of a location containing a condition that the railway company should

Over Foreign Corporations.

13. A bill in equity may be maintained by a stockholder of a corporation organized in another State and doing business here, against the corporation and its president and directors, to restrain the directors from carrying on in this Commonwealth a business not authorized by the company's charter, and also to compel the directors to account for property of the corporation misappropriated by them, this being in the nature of a suit by the corporation against wrongdoers whose persons and property are in the Commonwealth rather than a regulation of the internal affairs of the foreign corporation. *Richardson* v. *Clinton Wall Trunk Manuf. Co.* 580.

To compel new Execution of mutilated Instrument.

14. In a suit in equity to compel the defendant to execute anew an assignment to the plaintiff which the defendant wrongfully had mutilated, it appeared, that by an agreement in writing the defendant gave the plaintiff an equal interest in a certain patent and in return the plaintiff agreed to furnish capital as needed. It was agreed, that the patent should be assigned to the plaintiff to be held by him in trust and assigned by him "to a corporation now organized or to be organized whenever the parties may deem it advisable for the purpose of carrying on the business," and that the capital stock of the corporation to which the patent should be assigned should be divided in equal shares between the plaintiff and the defendant, but that the amount to be contributed by each to be sold for working capital should be fixed by the plaintiff. No other details were agreed upon by the parties. It further appeared, that in accordance with the agreement the defendant executed and delivered to the plaintiff an assignment of the patent, and thereafter wrongfully obtained possession of it and mutilated it by tearing off the signature and seal, thereby preventing the plaintiff from having the assignment recorded at the patent office, and thereafter refused to recognize his agreement as binding. *Held*, that the plaintiff was entitled to relief; that the provision that the plaintiff should assign the patent to a corporation "whenever the parties may deem it advisable for the purpose of carrying on the business" did not give the defendant the right to terminate the whole arrangement at any time he saw fit; that, when the defendant had transferred the patent to the plaintiff, the plaintiff was under an obligation to furnish within a reasonable time the capital needed and the defendant under a corresponding obligation to give him a reasonable time to do so; that the defendant, wrongfully having mutilated the assignment, should execute it anew, and, upon his doing so, the plaintiff either must assign the patent to an existing corporation reasonably fitted for the purpose, or must organize such a corporation as was reasonably proper and furnish such capital as was reasonably necessary, the plaintiff and defendant having equal shares in the capital stock of the corporation whether existing or to be formed. *Niles* v. *Graham*, 41.

Injunction.

15. A bill, to restrain the defendant from buying milk for use in his business from any person other than the plaintiff, alleged, that the plaintiff had an

exclusive contract with the defendant to sell him the milk that he should require in his business and that the plaintiff paid $100 as a consideration for the contract. There was no allegation as to the length of time covered by the contract or as to the price or the amount of milk to be delivered or the time and place of delivery. On demurrer, *held*, that the contract as set forth was too vague and indefinite to enforce by injunction. *Giles* v. *Dunbar*, 22.

Mortgagor has no right, as matter of law, to maintain a bill to redeem after foreclosure sale and before execution of conveyances to carry it out, see MORTGAGE, 6.

Equitable restriction cannot be enforced by one who himself has violated it, see EASEMENT, 1.

One taking satisfied mortgage as security for new debt has no right to redeem or to restrain foreclosure of prior mortgage, see MORTGAGE, 7.

EQUITY PLEADING AND PRACTICE.

Parties.

When joinder of executors and administrators in bill in equity sufficient without joinder of those beneficially interested in the estates represented by them, see JOINT OWNERS AND OWNERS IN COMMON, 2.

Amendment.

1. The refusal of leave to file an amendment to an answer in a suit in equity is within the discretion of the court. *Tufts* v. *Waxman*, 120.
2. A plaintiff in equity after a master has filed his report may be allowed to amend his bill in any manner that will enable him to maintain it for the cause for which it was brought. Such an amendment properly may be allowed where the bill originally sought to restrain the foreclosure of a mortgage of personal property and to redeem from the mortgage, and by agreement of parties the property was sold while the case was pending. *King* v. *Howes*, 445.

Master's Report.

3. When a master, directed to hear two cases together, embodies in his report in one case facts and findings which relate to the other, this furnishes no ground for an exception, but the case in hand is to be decided upon such facts stated in the report as properly pertain to it. *Flye* v. *Berry*, 442.
4. In a suit for an accounting between partners, a motion was made to recommit a master's report to the master, directing him to make specific findings upon twelve questions concerning matters which were considered or might have been considered in making up the account. The original rule to the master, which was not appealed from, did not require such findings. The report was long and elaborate and stated very fully the considerations on which the master's decision was founded. The motion was denied by the judge. *Held*, that his discretion was exercised rightly. *Cawley* v. *Cawley*, 451.

Issues for Jury.

5. A party to a suit in equity asking this court to revise the discretion of a judge of the Superior Court in refusing to frame issues for a jury in order to prevail must show that the issues of fact could be more satisfactorily tried by a jury than by the judge and that the judge in refusing to frame issues did not exercise his discretion rightly. *Culbert* v. *Hall*, 24.
6. In a suit in equity the answers were filed June 12. Two days later the judge ordered the pleadings completed forthwith and the cause set down for hearing on the merits for the week beginning June 18. The plaintiff filed replications on July 5, and on August 8 filed a motion for the framing of issues for a jury. The motion was denied. *Held*, that the delay in making the motion alone was enough to justify the denial. *Ibid.*

Final Decree.

7. On June 1, 1900, the Superior Court made an order, that a certain bill in equity be dismissed for want of prosecution unless the master's report should be filed on or before January 1, 1901. On February 28, 1901, a motion was made to extend the time for filing the master's report. This was denied, and the plaintiff appealed. He also filed a motion or petition asking that the order of June 1 be vacated or modified. This was denied "without prejudice," and the plaintiff appealed. The Superior Court was asked to report the facts, but did not do so, apparently assuming that the bill was dismissed. On an application, treated as a petition for leave to file a bill of review, it was *held*, that there was no final judgment in the Superior Court, and consequently that a writ of review would not lie, and also that the appeals on the interlocutory orders, if before this court, must be dismissed as prematurely entered. *Semble*, that, so far as appeared, the case ought to be on the docket of the Superior Court. *Plaisted* v. *Cooke*, 118.
8. Where it appears on the record of a case reported from the Superior Court that a final decree was entered for the plaintiff from which the defendant did not appeal, the decree of the Superior Court must stand. *Tufts* v. *Waxman*, 120.

Foreclosure of Mortgage.

Departure by special master conducting foreclosure sale from decree ordering sale, see MORTGAGE, 3.

ESTOPPEL.

In Pais.

1. A railroad company is not estopped to assert that in changing the grade of a certain public street it acted wholly without authority. *Peabody* v. *Boston & Providence Railroad*, 76.
2. If a wholesale dealer lets a piano upon a written lease to a retail dealer in musical instruments, who sells it without authority to one having no notice of the lease, the lessor is not estopped from asserting his title and

Estoppel (*continued*).

maintaining tort against the purchaser for the conversion. *Oliver Ditson Co.* v. *Bates*, 455.

Administrator not estopped to claim property as his own because he inventoried it as property of intestate, see GIFT.

Mortgagee of chattels who by mistake signs discharge on margin of record not estopped to revoke it before acted on, see MORTGAGE, 10.

To object to regularity of proceedings of commissioners for partition in which objector has taken part, see PARTITION.

By Deed.

8. One who had conveyed certain real estate through a third person to his wife mortgaged it, giving the mortgage deed in his own name, and then in good faith insured the buildings in his own name by a policy payable in case of loss to the mortgagee. A loss by fire occurred. It was stated, that after the fire the wife reconveyed the property through a third person to her husband. *Semble*, that if the reconveyance was made as stated, the insured could not recover on the policy in the right of the mortgagee, as at the time of the loss the mortgagee had no title, and his subsequent title by estoppel acquired after the fire could not operate against the intervening rights of the insurance company. *Doyle* v. *American Fire Ins. Co.* 139.

EVIDENCE.

Presumptions and Burden of Proof.

As to presumption and burden of proof on the issues of sanity and of undue influence, see WILL, 5, 6.

Holder of demand note has burden of proving custom or other excuse for delay in making demand, see BILLS AND NOTES, 1.

In action by attorney for fees, defendant setting up negligence of plaintiff in performance of services has burden of proving it, see ATTORNEY, 2.

Burden of proof on indorsee of note procured by fraud to show that he gave value, see BILLS AND NOTES, 5.

Burden on one objecting to certificate of public officer on ground of lack of official seal, to show that there was an official seal, see *post*, 22.

As to presumption of fact of negligence from derailment of car, see NEGLIGENCE, 18.

Relevancy and Materiality.

To show possession of personal property.

1. *Semble*, that to show that a person is the tenant and actual occupant of a building is evidence that he is in possession of chattels in use in the building. *Hayes* v. *Tidsbury*, 292.

To show negligence of railroad company.

2. In an action against a railroad company for negligence in stopping a train suddenly, after starting it without noticing that passengers were still alighting, the number of persons at work on the train properly may be considered by the jury upon the question whether sufficient care was

exercised to ascertain the condition of things when the order to stop was given. *Comerford* v. *New York, etc. Railroad*, 528.

To show necessity of repairs.

3. In an action by a tenant against his landlord for breach of an alleged agreement to make repairs in a building, a building inspector, called as a witness by the plaintiff, was asked to state, what was the condition as to protection for tenants in the building, and what if anything was required, and, after objection by the defendant, answered "One purpose would require one provision, another purpose would require another." *Held*, that the question was proper, the condition of the premises being material on the question of damages, if for no other reason, and, that the answer obviously was intended as a preliminary statement and in no way could have prejudiced the defendant. *Daly* v. *Demmon*, 543.

To show fraud.

4. In an action by an attorney at law on an account annexed for a balance alleged to be due him upon a bill for professional services, the defendant filed a declaration in set-off. To this the plaintiff pleaded in bar a discharge in bankruptcy. The defendant filed an answer to the plea in bar, alleging, that the discharge of the plaintiff was not a bar to the defendant's claim as the plaintiff's indebtedness to the defendant was created by the plaintiff's fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. It appeared, that the plaintiff had been one of two trustees for the benefit of the defendant's creditors. The defendant offered to show that the trustees received about $12,000 from assets assigned to them, that they paid creditors only about $2,400 and that the plaintiff's co-trustee charged $3,000 for his services, the charge being known to the plaintiff. The evidence was excluded. *Held*, that the exclusion was right, as the evidence had no tendency to prove the allegations of the answer to the plea of discharge. *Also*, the defendant offered in evidence the record in the case of *Cooke* v. *Barrett* reported in 155 Mass. 413, a suit in equity in which the plaintiff failed by reason of laches. The evidence was excluded. *Held*, that the exclusion was right, as the plaintiff's failure in that suit had no tendency to show that his indebtedness to the defendant was created by fraud in the manner alleged. *Held*, *also*, that evidence of an overcharge and of a sum of money received and not accounted for, neither of which were alleged in the declaration in set-off, rightly was excluded. *Held*, *also*, that evidence, tending to show the plaintiff's connection with the adoption by the defendant of a person as his child in order to obtain a bequest, and of a will of the defendant made in favor of the plaintiff, was immaterial to the issue and excluded rightly. *Also*, it appeared, that at one time the plaintiff attempted to discontinue this action and brought another action against the defendant on a promissory note for $1,500 which he alleged had been given by the defendant in settlement of this action. The jury found in that case that the note was not given in settlement of this action and the defendant had judgment. *Held*, that the record of the other action was immaterial and properly was excluded. *Cooke* v. *Plaisted*, 82.

Evidence (*continued*).

Where matter not in issue.

5. In an action against a deputy sheriff for the conversion of the plaintiff's goods attached by him, in which the plaintiff's title was not in dispute, the plaintiff offered in evidence receipts signed by the attaching creditor acknowledging payment for the goods by the plaintiff. The evidence was excluded. *Held*, that the evidence properly was excluded as immaterial, and that it was not necessary to consider whether, if the plaintiff's title had been in dispute, it would have been admissible. *Riley* v. *Tolman*, 335.

Of plaintiff's judgment whether he was negligent, see *post*, 12.

In action for money paid on wagering contracts by married woman whose husband acted as her agent, undisclosed intention or wishes of plaintiff immaterial, see WAGERING CONTRACTS, 2, 3.

In suit for libel, of charges made by plaintiff against defendant, see LIBEL AND SLANDER, 3.

For evidence admissible to show damage from publication of libel, see LIBEL AND SLANDER, 4.

Of statement by mortgagor of mortgaged chattels that the mortgage was paid, see MORTGAGE, 11.

On indictment for keeping house of ill fame evidence that two defendants living together as man and wife are not legally married relevant, see WITNESS, 3.

In action for attorney's fees, evidence that defendant paid money to third persons on account of suits properly excluded, see ATTORNEY, 2.

Rising of ring in floor of street car after accident caused by it, material as showing that defect was one which defendant had opportunity to know about, see NEGLIGENCE, 14.

To show value of flats, evidence of value of sea wall on premises, see DAMAGES, 1.

To show title to flats and right to dredge, see DAMAGES, 3.

To show negligence in storing of steel bars, see NEGLIGENCE, 15.

Hearsay.

6. Declarations of a judge of the United States District Court are not admissible to show what occurred in that court twenty days before, and the fact that the party against whom the evidence is offered was present when the declarations were made, does not make them competent, if they were not made to him nor made under such circumstances that his silence could be treated as an admission. *Keith* v. *Marcus*, 377.

Expert allowed to testify to statements made to him by plaintiff on which he founded his opinion, see *post*, 13.

Res Gestæ.

7. On an appeal under St. 1890, c. 127, from a refusal of the town of Brookline to abate a tax assessed in 1899 upon the petitioner on the ground that the petitioner had changed his domicil in 1887 from Brookline to Newcastle, Maine, the town requested a ruling, that evidence that the petitioner in September, 1886, and on March 12, 1887, notified the selectmen

13. An expert may be examined as to statements made to him by a plaintiff in regard to his sufferings caused by the injury for which he sues, as being the grounds and reasons on which the expert formed his opinion, although otherwise the evidence would be excluded as hearsay and as self serving statements made by a party to a suit. *Cronin* v. *Fitchburg, etc. Street Railway*, 202.

Declarations of deceased lessee of wharf as to depth of water taken as statement of result of experience, see DAMAGES, 2.

Parol and Extrinsic affecting Writings.

14. *Semble*, that extrinsic evidence of an agreement between a devisee and a testator is admissible to show a secret trust as well where there is an inconsistent express trust as where the devise is upon its face absolute. *Ham* v. *Twombly*, 170.

15. A memorandum of a contract for the sale of merchandise, to be delivered from time to time, stated the quantities and prices of the different kinds of goods and the times for delivery but was silent as to the times of payment. The plaintiff, instead of declaring on an oral contract of which this was a memorandum, declared on the memorandum as a contract in writing. Evidence was admitted of conversations between the parties before and after the time of the writing, tending to show an agreement and understanding of the parties, that the buyer should have a credit of sixty days. *Held*, that this evidence should have been excluded as enlarging or varying the contract declared on, which, naming no times of payment, by implication required payment to be made on delivery of each shipment of the goods. *Morton* v. *Clark*, 134.

Conversations between Husband and Wife.

16. Testimony by a wife that her husband acted by her authority is not necessarily made incompetent by her statement that her conversations with him were private. *Nichols* v. *Rosenfeld*, 525.

17. In an action by brokers against a married woman for a balance alleged to be due on account of the purchase and sale by them for her of certain stocks, the defence was that the transactions were those not of the defendant but of her husband. The defendant was allowed to introduce evidence that she had authorized no one other than her husband to purchase stocks for her. She then wished to show, that, while she had had conversations with her husband in regard to the stocks, she had not authorized him to purchase them for her, and that he was not her agent. There was no offer to show that any third person was present at any conversation between her and her husband. The evidence was excluded. *Held*, that the exclusion was right. The effect of allowing the evidence would have been to enable the defendant to give either her construction of or the result of conversations between her and her husband, inadmissible under Pub. Sts. c. 169, § 18, cl. 1. R. L. c. 175, § 20, cl. 1. *Leland* v. *Converse*, 487.

Communications between Attorney and Client.

18. The counsel for a plaintiff was allowed to testify to conversations between the plaintiff, himself and the defendant, when they were all together, with a stenographer, in his office. He was acting at the time for the defendant as well as for the plaintiff. *Held*, that the conversations were not privileged. *Thompson* v. *Cashman*, 36.

19. When the privilege of communications between attorney and client has been waived, by the client being present in court and allowing the attorney to testify to the conversation without objection, and by herself testifying in regard to the conversation, on appeal to a higher court she cannot withdraw her waiver. *Whether* a different rule should obtain with regard to testimony tending to incriminate a witness, *quære*. *Green* v. *Crapo*, 55.

Proof of Foreign Law.

20. A dictum of the highest court of another State is evidence of the law of that State. *Haven* v. *Haven*, 573.

21. Under Pub. Sts. c. 169, § 73, the law of a foreign country may be proved without authenticated copies if a witness who has examined the copy and compared it with the original testifies that it is correct. *Anglo-American Land, etc. Co.* v. *Dyer*, 593.

Proof of Official Authentication.

22. *Semble*, that where one objects to the certificate of a public official that a company is incorporated, because it is not under an official seal, it is incumbent upon him to show that there is an official seal. *Anglo-American Land, etc. Co.* v. *Dyer*, 593.

Evidence of Intention.

Evidence of intention to change or retain domicil, see *ante*, 7; TAX, 1–3.

Circumstantial Evidence of Negligence.

23. In an action against a street-railway company for injuries caused by an excavation in a highway between the tracks of the defendant, alleged to have been made and maintained by the defendant in the repair of its tracks contrary to the duty imposed by St. 1898, c. 578, § 11, with a count at common law for creating and maintaining a dangerous excavation in the highway, there was no testimony that any workman of the defendant was seen to make the excavation or that it was ordered to be made by any one in the defendant's service, but it appeared, that before the ditch was made water ran from a point near the north rail to a switch of the defendant near by, carrying sand and gravel into the switch and impeding its operation, that the excavation started at the north rail and went toward the south rail connecting with a gutter beyond it, that it gradually deepened in its course from the north rail and presented the appearance of having been made by digging and not of having been washed out, and that while it was there employees of the defendant were at work upon the track replacing old ties with new ones within a few yards of the excavation. The defendant, although it introduced evidence, made no attempt to show

EXECUTOR AND ADMINISTRATOR.

FIRE COMMISSIONER.

FISHERY.

A license under Pub. Sts. c. 91, § 97, "to plant, grow and dig oysters" on a specified area of flats, gives the licensee the exclusive use of the flats described in the license, and another who digs with his hands quahaugs from the included flats is liable to the licensee in a civil action. *Griffith* v. *Savary*, 227.

FLATS.

FRATERNAL BENEFICIARY ASSOCIATION.

A certificate of membership in a fraternal benefit association contained a promise to pay $5,000 to the wife of the member on proof of the death of the member in good standing, and the promise was declared to be made "in consideration of the full compliance with all the by-laws . . . now existing or hereafter adopted." The certificate contained conditions, that all assessments should be paid and that all advances for sick or disability benefits should be deducted. After the issuing of the certificate and before the death of the member, the association changed its by-laws, cutting down the highest amount to be paid upon any benefit certificate to $2,000, and also providing that five per cent should be deducted from the face value of certificates for an emergency fund. In an action on the certificate, all its conditions having been performed, it was *held*, that the express promise to pay $5,000 could not be changed by the association; that the words "full compliance with all the by-laws," if they meant more than compliance with the conditions in regard to payment of assessments and deduction for advances, meant doing what the by-laws required the member to do, and did not mean that the sum promised in return for the consideration could be diminished. *Newhall* v. *American Legion of Honor*, 111.

FRAUD.

FRAUDS, STATUTE OF.

GAMING.

GIFT.

GUARDIAN.

HARBOR AND LAND COMMISSIONERS.

HEIRLOOM.

Referred to, see JOINT OWNERS AND OWNERS IN COMMON, 2.

HOUSE OF ILL FAME.

Materiality of evidence that man and woman indicted for keeping house of ill fame living together are not lawfully married, see WITNESS, 3.

HUSBAND AND WIFE.

A deed of real estate, reserving a life estate in the grantor, made by a husband principally for the purpose of depriving his wife of her statutory share in his estate, but also given in consideration of care bestowed and to be bestowed upon the grantor as long as he lives, is valid against the grantor's widow. *Brownell* v. *Briggs*, 173 Mass. 529, explained. *Leonard* v. *Leonard*, 458.

INCUMBRANCES.

1. A way by prescription cannot be determined or defined on a petition under St. 1889, c. 442, which relates only to cases where the title to land "appears of record" to be affected by a possible incumbrance. *Crocker* v. *Cotting*, 146.
2. Under St. 1891, c. 323, providing for a board of survey in the city of Boston, and acts in amendment thereof, no incumbrance is created on land over which it is proposed to lay out a street until a plan is filed under the provisions of that act. *French* v. *Folsom*, 483.

INFANT.

1. An infant on coming of age cannot affirm part of a contract without ratifying the whole of it. *Ready* v. *Pinkham*, 351.
2. The owner of a lot of land agreed to sell it to a minor and to build him a house upon it. The minor was to pay to the vendor a certain sum in cash and to give a mortgage for the balance of the purchase money to another person who was to furnish the money from time to time for building the house. These things were done, and the minor gave an assignment to the vendor of all the money to be furnished under the mortgage. When the house was completed the minor moved into it, then, coming of age, conveyed it to the plaintiff, telling him that there was a mortgage upon it which he did not consider valid, because he made it when a minor. The defendant, having acquired the mortgage, proceeded to foreclose it, and the plaintiff brought a bill in equity to restrain him from doing so. *Held*, that the transaction was all one contract, and that the minor on coming of age could not affirm part of it without ratifying the whole, and, having kept the land, could not avoid the mortgage given for the purchase money. *Ibid.*

INSOLVENCY.

INSURANCE.

Fire.

Life.

any of my said descendants, I give said portraits to such of my four sons as shall then be alive, and if none of them shall then survive, I give said portraits to the male descendants of my said sons." The house continued to be occupied by lineal descendants of Ann Haven until some time in 1895, and apparently until 1898, up to which time the portraits remained there. In 1896 a petition was filed in the Probate Court in New Hampshire in which Ann Haven's estate had been settled, praying for the appointment of an administrator *de bonis non* of her estate on the ground that the portraits were unadministered assets. This case came by appeal and reservation to the full bench of the Supreme Court of New Hampshire, who affirmed a decree dismissing the petition and declared in the opinion of the court, that "The rights of parties in the portraits furnish no occasion for further administration of Ann's estate. The only parties having such rights are the plaintiff, the defendant, and George G. Haven, who are tenants in common of the portraits." The three persons thus designated were the male descendants of the sons of Ann Haven, all of those sons being dead. The same plaintiff filed a bill in equity in this Commonwealth under St. 1891, c. 383, praying the court to order a sale of the portraits and a proper disposition of the proceeds. A demurrer to the bill was overruled. *Held*, that the demurrer was overruled rightly and that the plaintiff was entitled to the order prayed for; that, although the portion of the above quoted opinion in regard to the title to the portraits might be *obiter dictum*, it was evidence of the law of New Hampshire, and disposed of the case, so that it was not necessary for this court to consider, whether under our law the gift to the male descendants of the four sons would be valid, or whether the direction, that the portraits should remain in the mansion house so long as it was occupied by any of Ann Haven's lineal descendants, could be supported as a disposition of the portraits as heirlooms. *Held*, *also*, that the plaintiff was guilty of no laches, as the decision of the Supreme Court of New Hampshire gave full effect to the clause giving the portraits to the male descendants of the four sons, and by that clause the plaintiff and the other two male descendants did not become entitled to the possession of the portraits until the mansion house had ceased to be occupied by a lineal descendant of Ann Haven, and there was nothing to show laches since that time, or to show that if there had been delay the defendant was prejudiced by it. *Held*, *also*, that it was not necessary, that the legatees, distributees and heirs at law of the children of Ann Haven should be made defendants, the executors and administrators of the estates of those children having been made defendants and representing them. *Haven* v. *Haven*, 573.

Bill in equity under St. 1891, c. 383, praying for sale of personal property owned in common not barred by special statute of limitations, see LIMITATIONS, STATUTE OF, 3.

JOINT TENANTS AND TENANTS IN COMMON.

1. If one of two cotenants under a lease being in sole occupation of the premises by permission of the other surrenders possession to the landlord,

JURISDICTION.

KANSAS.

LACHES.

LANDLORD AND TENANT.

Assignment of Lease.

1. The acceptance of an assignment under seal of a lease makes the assignee liable for the rent reserved in the lease without his entering upon the land. *Collins* v. *Pratt*, 345.

Assent to Assignment.

2. In a suit in equity founded on an alleged false and fraudulent representation of the defendant, that he would procure the consent of his lessor to an assignment of his lease to the plaintiff, a letter from the lessor to the defendant contained the following: "In regard to your selling out the lease, etc., I hardly know what to say. I think that a party who could not pay you when purchasing your furniture would hardly be a good tenant for me. I hope that you will decide to remain for a year. If you should sell out I should expect that it would be to a good, reliable party." The defendant excepted to the finding of a master that, the letter contained "no positive promise to accept even a responsible tenant." *Held*, that the finding was right; that the letter, at most, meant that the writer was considering the matter, and might consent to a transfer if the tenant was satisfactory, but was not ready to make and did not make any positive agreement to do so. *Held, also*, that a refusal by the master to find that the plaintiff was a responsible party, would not sustain an exception, as under the above interpretation of the lessor's letter it was immaterial whether the plaintiff was responsible. *Russell* v. *Bryant*, 447.

Tenancy at Sufferance.

3. A tenant at sufferance made such by a conveyance of which he had no notice or knowledge is not liable in an action for rent under Pub. Sts. c. 121, §§ 3, 6, 8. *Dixon* v. *Smith*, 218.

Occupation under Revocable License.

4. In July, 1896, the plaintiff's land and buildings had been taken by the Boston transit commissioners under St. 1894, c. 548, and had been paid for in full. Thereafter the plaintiff continued his occupation until January 13, 1897, when the commissioners passed and communicated to him the following vote: "Voted, That W. [the plaintiff] be notified to pay for the occupancy of the portion of Lockwood's Wharf in Charlestown one hundred dollars per month from August 1, 1896, to January 1, 1897, to be paid forthwith, and at the rate of one hundred dollars per month from January 1, 1897, as long as his occupancy of the premises is not disturbed, or until he vacates the premises, and at a proportionate rate if his occupancy is disturbed, either party to have the privilege of terminating this

agreement on giving one month's notice in writing; and that if these terms are not accepted on or before January 16, 1897, he must vacate the premises forthwith or immediate possession will be taken." The plaintiff complied with the terms of payment named in the vote and continued to occupy the premises, paying rent up to October 1, 1897. On October 30 he was notified to vacate and on November 4 was ejected by one to whom the commissioners had given a lease for the purpose. The plaintiff sued the city for damages. *Held*, that the plaintiff could not recover; that the vote gave him no right of possession but only permission to occupy until disturbed, and that the provision as to terminating the agreement on giving one month's notice in writing related only to the arrangement as to the price to be paid. *Wiley* v. *Boston*, 233.

Water Rates.

5. Where there are several tenants in a building and only one water meter, and the lessor has made no attempt to apportion the water rates which his tenants are to pay under their leases, he cannot enter and terminate their leases for non-payment of water rates. *Harford* v. *Taylor*, 266.

Right of action of assignor of lease compelled to pay rent, against his assignee, see CONTRACT, 11.

Liability of landlord to guests of tenant for condition of building, see NUISANCE, 2.

In action for failure of landlord to repair, evidence of condition of premises relevant, see EVIDENCE, 3.

Action for inducing plaintiff to hire tenement by false representations that drainage was in good condition, see DECEIT.

LIBEL AND SLANDER.

Privileged Communications.

1. In an action for libel, the question, whether an account in a newspaper of a complaint and warrant and the trial thereon in a police court is a fair report of a judicial proceeding, assuming that these are judicial proceedings within the meaning of the law of privileged communications, is for the jury, as it depends in part upon oral testimony. *Parker* v. *Republican Co.* 392.

Evidence of Malice.

2. In an action for libel, a postscript to a letter relating to the business carried on at the defendant's office, written by one in charge of the office under the defendant and speaking of the plaintiff's "crooked manner of doing business," is admissible to show malice on the part of the defendant. It could be found that the agent acted within the scope of his authority. *Borley* v. *Allison*, 246.

Of Charges by Plaintiff against Defendant.

3. In an action for libel by one partner of a former firm of insurance agents against the other, the alleged libel consisted of a circular letter sent by

LIMITATIONS, STATUTE OF.

1. In an action to enforce against a resident of Massachusetts a statutory liability as a stockholder of a Kansas corporation, the defendant set up as an equitable defence, that he purchased for full value exceeding in amount his liability a note guaranteed by the Kansas corporation. It was contended by the plaintiff that this note was barred by the statute of limitations. *Held*, that the equitable defence did not depend on the defendant's right to maintain an action at law against the corporation, but were it otherwise, a suit on the note would not be barred by lapse of time because, first, the Kansas statute of limitations has no force here, and secondly, our statute of limitations does not run in favor of a foreign corporation which could not be sued in this Commonwealth. *Sargent* v. *Stetson*, 371.

Manner of taking objection of statute, see PRACTICE, CIVIL, 1.

Special.

2. The special statute of limitations does not apply to a personal claim of an executor against the assets in his hands. *Brown* v. *Greene*, 109.
3. A bill in equity under St. 1891, c. 383, praying for a sale of personal property owned in common and a proper disposition of the proceeds, is not barred by the special statute of limitations set up by the executor of one of the owners in common. Such a proceeding is not to enforce a claim or liability against the estate, but to determine the rights, if any, of various parties and estates in the property in question. *Haven* v. *Haven*, 573.

Special statute not bar to claim against administrator on joint liability of intestate although action begun as joint was made several after statute had run, see ACTION, SURVIVAL, 2.

LOWELL.

Under St. 1896, c. 415, the city council of Lowell has no power to make contracts for the city, but it has the power to make appropriations, and by § 8 it is provided, that "no liability shall be incurred . . . until the city council has duly voted an appropriation sufficient to meet such expenditure or liability," and that no sum "appropriated for a specific purpose" shall be expended for any other purpose. Under § 6 the board of health as the head of a department have authority to make contracts for that department. The city council voted, to borrow $25,000 for the purchase and erection of a "Smith Improved Garbage Cremator," and appropriated the sum named for that purpose, to be expended under the direction of the mayor and the board of health. The record of a meeting of the board of health showed a vote to ask the Smith company for plans and specifications and a refusal by a majority of the board to ask for bids from other companies because after the action of the city council it would be useless. Later, at a regular meeting of the board, it was voted, that the record be

amended by striking out the statement of the reason for the refusal, and by stating the true reason, that the majority of the board after investigation of the merits of the rival cremators, decided that the best interest of the city would be served by the selection of the Smith Cremator. On a petition of ten taxable inhabitants to enjoin the expenditure, it was *held*, that the appropriation by the city council was in lawful form, and that the court could not go behind the amended record of the board of health, and, at any rate, that the adoption of the amendment declared by necessary implication that in the present opinion of the board it was desirable to purchase the Smith Cremator on grounds independent of the vote of the city council, therefore, that the purchase was authorized by the unbiassed action of the board having authority to make it and the bill must be dismissed. *Stratton* v. *Lowell*, 511.

MALICIOUS PROSECUTION.

No jurisdiction in equity to restrain malicious prosecution of groundless action, see EQUITY JURISDICTION, 6.

When action for, is prematurely brought, see ABUSE OF LEGAL PROCESS.

MANDAMUS.

A petition for a writ of mandamus to order the judge and clerk of a municipal court to allow and enter an appeal of the petitioner from a judgment on which he was sentenced to imprisonment for two months in a house of correction will not be dismissed for the reason that the petitioner has served his sentence. *Weiner* v. *Wentworth*, 15.

Mandamus will not lie to compel insurance commissioner to change valuations, made in good faith, of assets or policies of insurance company, see INSURANCE COMMISSIONER.

MASTER AND SERVANT.

What constitutes Relation.

1. In an action against a defendant engaged in a general teaming business, the only question was whether the driver of the horse and wagon that knocked down the plaintiff was the servant of the defendant. The driver's only contract of employment was with the defendant who paid him his wages, but for some time he had been carrying property for an electric lighting company under some arrangement made with that company by the defendant. Every morning the driver reported with his horse and wagon to the company and after carrying out his orders all day returned at night to the defendant's stables. Sometimes he gave help, outside of driving his wagon and loading and unloading it, in pulling up arms on electric light poles or in pulling up machinery and the like. When the accident happened he was on his way to get some arms in pursuance of an order from the foreman of the company. *Held*, that there was evidence

MAXIMS.

MECHANIC'S LIEN.

METROPOLITAN PARK COMMISSIONERS.

METROPOLITAN WATER SUPPLY ACT.

MORTGAGE.

Of Real Estate.

charge of the previous mortgage just before his own mortgage is delivered to him, does not become thereby an equitable assignee of the previous mortgage, and his lien as against third persons begins when his own mortgage is recorded. *Berry* v. *Levitan*, 73.

10. If an acknowledgment of satisfaction and discharge of a chattel mortgage signed by the mortgagee on the margin of the record in the city clerk's office is to be treated as an assignment of the title to the goods to the mortgagor, it does not become operative until brought to his knowledge. If it is to be treated as an acknowledgment of payment, it can only operate by way of estoppel after some one has acted on it. Therefore, if such an entry on the margin of the record is made by mistake by a mortgagee, he may revoke it at any time before it is known to the mortgagor, and may show in an action brought against him for taking the goods under his mortgage, that the debt secured by the mortgage was never paid, that the discharge on the margin was made by mistake, and that he cancelled it on the margin before the mortgagor learned of its existence. *Frost* v. *George*, 271.

11. A mortgagee under a chattel mortgage signed by mistake a discharge of it upon the record in the city clerk's office which he afterwards revoked before it was known to the mortgagor. Between the time of the writing of the discharge and its revocation the mortgagor had given to another a bill of sale of the mortgaged chattels stating them to be "subject to one mortgage", the only mortgage to which the property was subject being the one already named. In an action by the holder of the bill of sale against the mortgagee for taking possession of the chattels under his mortgage, the plaintiff offered to show that the mortgagor when he gave the bill of sale to the plaintiff told him that the mortgage on the chattels had been fully paid. In fact no part of it had been paid. The evidence was excluded. *Held*, that the exclusion was right. The offer was not to prove a statement that the mortgage had been discharged upon the record, and the mortgagor then did not know of the defendant's entry on the record, which afterwards was revoked before he heard of it, and it did not appear that the plaintiff took the transfer relying on the statement. The fact that the mortgagor told the plaintiff that the mortgage was paid when it was not was immaterial. *Ibid.*

MUNICIPAL CORPORATIONS.

Officers and Agents.

1. If a fire commissioner of a town, who has authority to discharge a fireman at any time and again to employ him, stops his pay for a stated future period as a penalty for misconduct, such stoppage of pay is not a fine and legally may exceed the amount which the town is authorized to impose as a fine. *Norton* v. *Brookline*, 360.

Requirement of written Authority from Mayor.

2. Where a statute authorizing the extension and construction of a city street provides, that when about to do any work or make any purchase

the estimated cost of which amounts to or exceeds $2,000, the superintendent of streets "shall, unless the mayor give a written authority to do otherwise, invite proposals therefor by advertisements" published in a certain way, an indorsement of approval by the mayor on the contract after it is made and a similar indorsement at that time on the request for permission to dispense with advertising for bids, are not a sufficient compliance with the statute. *Warren* v. *Street Commissioners*, 6.

Liability for defect in highway, see WAY, 5, 6.
Licensing of slaughter houses by mayor and aldermen of cities and selectmen of towns subject to prohibition by boards of health, see BOARD OF HEALTH.
As to hearing before school committee and proof thereof, see SCHOOL, 1, 2.
Special authority of Chelsea, under St. 1900, c. 202, to borrow beyond the debt limit, see CHELSEA.
Legality of contracts and appropriations of city of Lowell, see LOWELL.

NAME.

Idem sonans, see ATTACHMENT, 1.

NEGLIGENCE.

Contributory Negligence and Due Care.

Of brakeman at work in freight yard, see *post*, 10, 11.
Of driver of covered wagon crossing street railway tracks, see *post*, 13.
Of passenger jolted from step of railroad car, see *post*, 7.
Of passenger alighting from moving train, see *post*, 6.
Of employee operating treadle of machine with box in his way, see *post*, 22.
Of employee operating defective circular saw, see *post*, 21.
Of woman returning through doorway to floor of different level, see *post*, 16.
Of landowner allowing earth piled on his land by defendant to remain there, see MASTER AND SERVANT, 2.
Materiality of plaintiff's judgment of his own due care, see EVIDENCE, 12.
For assumption of risk by employee, see *post*, 20–23.

Proximate Cause.

Railroad company not liable for accident caused by third party, see *post*, 8.

On Railroad.

1. A carrier of passengers is not responsible for hidden defects in a switching apparatus which could not be discovered by the most careful inspection. *Buckland* v. *New York, etc. Railroad*, 3.
2. A railroad company is not liable for an injury to a passenger from the derailment of a car caused by the breaking of a pin within a pipe of a switch holding a rod which moved a pair of frogs connected with the track, if the appliance was one in universal use and of the best kind and

In Storeroom.

15. In an action by a porter employed in a storeroom where steel bars were stored by leaning them against the walls between racks formed by a wooden pin on each side, for an injury caused by one of the bars falling after it had been in the same place for a month, it appeared, that this bar and another both four inches in diameter were placed by direction of a superintendent between two pins where there was not room for both of them to rest against the wall and one stood against the other in such a way that more than half of the outer one projected beyond the ends of the pins. *Semble*, that this might not be evidence of negligence. *Langley* v. *Wheelock*, 474.

As to risk assumed by porter in storeroom, see *post*, 23.

In a Building.

16. *Semble*, that a woman who has passed from the corridor of an office building into one of the rooms opening from it, the floor of which is about five inches higher than the corridor, without stumbling, is not in the exercise of due care if when coming out of the same doorway she falls on account of the difference in level of the floors. *Ware* v. *Evangelical Baptist, etc. Society*, 285.

Maintaining floor of corridor five inches lower than floors of rooms opening upon it not negligent, see NUISANCE, 1.

In Building in Process of Construction.

17. In an action under St. 1898, c. 565, for the death of the plaintiff's intestate caused by the falling of the roof of an engine room, owned and to be operated by the defendant and then in process of construction, it appeared, that the roof consisted of steel trusses then partly covered with terra cotta, that these trusses rested on steel columns, that the columns gave way, bending inward and causing the accident, that the columns were to have been enclosed in brick work, but that this only partly had been done, so that the brick wall was about ten feet short of two steel runaway girders one on each side of the room, supporting a steel crane with a movable hoist which extended from one side of the room to the other, that the crane was worked by electricity, lifted fifteen tons, and itself weighed forty-eight tons, that it was furnished by the same contractor that made the steel work of the roof, that the crane was to be ready for use before the completion of the building, and that one of the uses to be made of it was in hoisting and moving various heavy articles needed to complete and equip the building, that the steel work was done, except some connecting pieces that could not be put in until the brick work was more complete, that the plaintiff's intestate was at work in the employ of a contractor doing the mason work, that the crane was not under the control of the plaintiff's employer and its operator was not in his employ. There was evidence that the crane was used to move stones for the engine foundations not a part of the work of that contractor, and in moving machinery and steam pipes not shown to be covered by any contract with an independent con-

work. His foot caught against the box, so that he was unable to remove the pressure from the treadle, and the die came down on his hand and cut off two fingers. *Held*, that he could not recover from his employer for this injury, as he was not in the exercise of due care, and also assumed the risk of the danger he had foreseen. *Dobbins* v. *Lang*, 397.

23. A porter employed in a storeroom where steel bars are stored by leaning them against the walls between racks formed by a wooden pin on each side, takes the risk of an injury caused by one of the bars falling after it has been in the same place for a month. *Langley* v. *Wheelock*, 474.

As to risk assumed by freight brakeman ordered to go between two cars to repair defective coupling, see *ante*, 10.

Acts of superintendent.

24. In an action under the employers' liability act for injuries caused by the alleged negligence of the defendant's superintendent while exercising superintendence, it appeared, that the plaintiff operated a washing machine in the defendant's bleachery, and that while he had stopped his machine and had gone out of sight on a floor above in order to tighten certain cylinders which dragged the cloth along as it came from his machine, the superintendent came by and negligently with his own hand started the machine, causing the plaintiff's injuries. *Held*, that starting the machine was an act of superintendence. *Roche* v. *Lowell Bleachery*, 480.

25. In an action for personal injuries by one employed as a helper in the defendant's iron works, it appeared, that the plaintiff was ordered by a person, who he said was "boss" and had six or seven and perhaps more men under him, to carry pieces of pipe to a part of an unfinished building of the defendant which was reached by passing over a temporary bridge laid that morning, formed by three planks side by side fastened together by a piece of wood nailed underneath in the middle, that as the plaintiff after leaving a piece of pipe was returning over the planks, one of them tipped or bent, his toes caught and he fell and broke one of his legs, and that after the accident he noticed that some of the nails had come out of the cleat. *Held*, that, if the person called "boss" was acting as superintendent and was not merely a foreman in charge of a gang, it did not appear that he had anything to do with the planks; *also*, that the planks could not be considered ways or works within the meaning of the employers' liability act, being used only for a temporary purpose; *also*, that the evidence would not warrant a jury in finding that the defendant was negligent in failing to furnish the plaintiff with a suitable and safe way over which to pass in doing his work. *Morris* v. *Walworth Manuf. Co.* 326.

For doctrine of vice principal as held in Connecticut, see *post*, 29.

Duty to provide safe appliances.

26. In an action by an employee of the defendant, injured while operating a circular saw by the machine throwing a piece of board against him, there was evidence tending to show, that the machine "wobbled" and that the accident was caused by the wobbling, that the saw might have been sprung or that it might have been set improperly on the arbor or the

NEGOTIABLE INSTRUMENTS ACT.

NEW TRIAL.

NUISANCE.

OUSTER.

OYSTER BED.

PARTIES.

PARTITION.

owners, and that by taking part without objection in the method adopted by the commissioners for the purpose of ascertaining the sum to be paid as owelty he lost any right that he otherwise might have had to object to it. *Nichols* v. *Nichols*, 490.

PARTNERSHIP.

1. In a suit for an accounting between partners, it appeared, that when the partnership was formed the defendant, a coal dealer, turned over his stock on hand without any inventory or ascertainment of its value to the partnership which thenceforth carried on the same business. The plaintiff, the defendant and several teamsters of the firm gave their estimates of the amount of coal on hand when the firm began business, which differed widely. The master, finding this evidence unsatisfactory, made calculations based on the amount of coal bought and sold by the firm from time to time, as it was shown by their books, and the amount on hand at the close of business. There was also before the master the testimony of an expert accountant employed by the plaintiff to examine the books and exhibits. The master found the accountant's computations and estimate to be correct. *Held*, that no error appeared, and that the court could not say that the master was wrong in relying on the computations of the expert founded on the books and vouchers. *Cawley* v. *Cawley*, 451.
2. In an action for money lent to a partnership of which the defendant was a member, it appeared, that after the money was lent the partnership was dissolved, and the other partner assumed the debts and later was petitioned into insolvency. The plaintiff then began this action and ten days afterwards proved his claim in the insolvency proceedings and it was allowed. The defendant contended that these facts constituted a discharge of the defendant under Pub. Sts. c. 157, § 125. R. L. c. 163, § 142. *Held*, that the statute did not apply, not being intended to take away a creditor's previously existing rights. The insolvent was liable as a partner apart from the provision of the statute, and the proof against his estate was an equivocal act and not an election. *Priesing* v. *Crampton*, 492.

Jurisdiction in equity to settle accounts between partners, see EQUITY JURISDICTION, 2.

PERPETUITIES.

For devise so construed that rule against perpetuities did not apply, see DEVISE AND LEGACY, 7.

Validity of devise to male descendants of testator's children referred to, see JOINT OWNERS AND OWNERS IN COMMON, 2.

PLEADING, CIVIL.

Declaration.

1. In an action by a trustee in bankruptcy to recover the cash surrender value of an insurance policy on the life of the bankrupt, the declaration

must contain averments showing that the policy has a cash surrender value, and if issued in another State the laws of that State giving such a policy a cash surrender value must be stated as facts. An averment that "said policy was an asset, it having at the time a cash surrender value of $692.50," is bad on demurrer, being either a conclusion of law or a deduction of fact from primary facts not stated and necessary to set forth a cause of action. *Haskell* v. *Equitable Life Assur. Society*, 341.

As to declaration in case of incomplete memorandum of oral agreement, see EVIDENCE, 15.

Variance.

2. The allegations in a declaration of injury to "the plaintiff's carriage" and "the plaintiff's horse" are satisfied by proof of any interest sufficient to support an action. *Meaney* v. *Kehoe*, 424.

PLEADING, CRIMINAL.

Indictment.

1. A count for conspiracy to procure illegal voting and a count for aiding and abetting illegal voting are for offences similar in their nature, mode of trial and punishment and may be joined in one indictment at common law. *Commonwealth* v. *Rogers*, 184.
2. An indictment, for conspiring to procure persons to vote at a certain caucus who were not entitled to vote there, is not bad because under its charges the conspiracy might be to procure votes which were illegal for different reasons under St. 1898, c. 548, §§ 377, 378, and to abet contrary to § 390 of that statute, the offences punished under these sections being different, since the conspiracy alleged is one, and properly might be alleged to intend them all. *Ibid.*
3. On an indictment for a conspiracy to procure persons to vote at a caucus who were not entitled to vote there, the conspiracy might be completed before any of the persons to be procured had been agreed upon, and the particular nature of the disqualification is not material to the offence and need not be alleged in the indictment. *Ibid.*
4. However it may be as to an indictment for illegal voting, *semble*, that on an indictment for abetting certain persons not entitled to vote in voting at a caucus, it is not necessary to allege the particular disqualification, *but*, if the failure to do so is a defect, it is one of form and can only be taken advantage of by special assignment. *Ibid.*
5. Under St. 1899, c. 409, § 10, an indictment, for conspiring to procure persons to vote illegally at a certain caucus, need not state the place of the offence. *Ibid.*

Variance.

Fact that conspiracy is indictable in its initial stages does not prevent its being indictable in its final form, see CONSPIRACY, 2.

PLEDGE.

Executor may pledge property of estate in his charge, see EXECUTOR AND ADMINISTRATOR, 1.

PRACTICE, CIVIL.

Abatement and Motion to Dismiss.

1. A petition for damages from the widening and alterations of a highway, under Pub. Sts. c. 49, §§ 68, 69, 79, St. 1892, c. 415, if land is taken, must be filed within one year from the day the way is entered upon and possession taken, and, in all other cases, within one year from the date of the order. Assuming that the defence that a petition was not filed in time under these provisions must be pleaded, and that it may be waived, yet, in a case where no answer has been filed and none demanded, the objection may be taken by an oral motion to dismiss made when the jury is impanelled, by consent reduced to writing during the trial and "formally filed in writing" some days after the verdict. *McGrath* v. *Watertown*, 380.

Effect of failure to plead in abatement nonjoinder of part owner in action for injury to personal property, see *post*, 27.

Agreed Facts.

2. When a case is submitted to the Superior Court on agreed facts and no power is given to draw inferences, that court by its finding can add to the statement only such conclusions as the law implies. If a power to draw inferences is given, and is exercised by the Superior Court, this court will not revise the finding further than to decide whether the facts agreed furnished any warrant for the conclusion drawn. *Norton* v. *Brookline*, 360.

Amendment.

3. If an action for goods sold is brought in the name of a corporation when it should have been brought in the name of a receiver of its property, the defect can be cured by amendment. *Philadelphia, etc. Coal & Iron Co.* v. *Butler*, 468.

4. It is within the power of a trial court to allow the attaching officer after verdict and before judgment to amend his return on the writ by adding thereto certain charges and fees for the care and custody of the property, this being especially permissible where the amendment relates to matters that occurred after the entry of the writ. If the defendant wishes to object to the officer's charges he must appeal from the taxation of costs by the clerk. *Harding* v. *Riley*, 334.

5. The only effect of an omission to give notice to a defendant of an amendment of the writ, which does not change or enlarge the cause of action or introduce any new party, is that the defendant is not precluded by the allowance of the amendment from afterwards contesting it. *Norris* v. *Anderson*, 308.

Effect of amendment on attachment of realty, see ATTACHMENT, 2, 3.

Allowance of amendment setting up equitable defence, see *post*, 10.

Leave to amend matter of discretion, see *post*, 17; EQUITY PLEADING AND PRACTICE, 1.

Charging Jury.

6. In an action for injuries caused by horses attached to a cart running away and striking the plaintiff, the counsel for the plaintiff in his argu-

ment assumed in accordance with the testimony of the eye-witnesses that the driver was at the tail of the cart when the horses started, and the judge in charging the jury made the same assumption. At the end of the charge the counsel for the plaintiff objected to this assumption and asked the judge to call the jury's attention to the contention of the plaintiff that the driver was not by his cart when the horses started. The only evidence from which the absence of the driver in any way could be inferred was testimony that the driver did not appear on the scene of the accident until fifteen or twenty minutes after it occurred, the place being eight hundred and fifty feet away from where the horses started. The judge refused to charge as requested. *Held*, that the judge was justified in refusing to suggest a new argument in behalf of the plaintiff at the end of the charge especially as there was the merest scintilla of evidence on the subject if there could be said to be any at all. *Gould* v. *Gilligan*, 600.

Conduct of Trial.

Reading books to jury.

7. It is within the discretion of a presiding judge to regulate the reading of books to the jury, and this discretion was exercised properly in refusing to allow counsel in this case to read to the jury from the decision in *Stone* v. *Stone*, 179 Mass. 555. *Stone* v. *Commonwealth*, 438.

Cases tried together.

8. An action under St. 1898, c. 565, for the death of the plaintiff's intestate caused by the falling of the roof of an engine room, owned and to be operated by the defendant and then in process of construction, was tried at the same time with an action by the same plaintiff for the same death against the steel company which made the steel trusses of the roof that fell and also made the steel columns that failed to support the trusses. At the close of the plaintiff's evidence, the defendant owner elected to rest on the plaintiff's case and put in no evidence. The judge refused to order a verdict for the defendant owner, and also refused to allow him to go to the jury immediately and before the defendant steel company had put in its evidence in the other case, and the steel company proceeded to introduce evidence tending to show that it was not liable and to cast the liability on the owner. At the conclusion of the evidence, the arguments in both cases were made, and the judge submitted both cases to the jury, instructing them, that as against the defendant owner they could consider no evidence introduced after he rested his case. The jury found against the defendant owner. *Held*, that, the questions, whether the cases should be tried together, and at what stage of the trial the case of the resting defendant should be submitted to the jury, were within the discretion of the presiding judge, and that, if the defendant owner was prejudiced, his only remedy was by a motion for a new trial. *Sullivan* v. *Boston Electric Light Co.* 294.

Costs.

Taxation of costs and appeal therefrom, see *ante*, 4.
When witness entitled to fee, see WITNESS, 4.

Double Costs.

9. R. L. c. 156, § 13, providing for double costs on frivolous appeal or exceptions, probably does not apply to a case coming up on report. *Tufts* v. *Waxman*, 120.

Equitable Defence.

10. The fact that a defendant has pleaded in set-off as the holder of a certain note is no reason for refusing to allow him to amend his answer by setting up an equitable defence, averring payment of the note by him in discharge of a guaranty thereon. *Sargent* v. *Stetson*, 371.

Exceptions.

11. The admission of immaterial evidence which does the excepting party no harm will not sustain an exception. *Dixon* v. *Smith*, 218.
12. Where two cases were tried together and the judge left it to the jury to say whether certain plans had been introduced against both of the defendants or only against one of them, when probably he ought to have decided that question for himself, this will not sustain an exception, if it nowhere appears that the plans contained anything prejudicial to the objecting defendant. *Sullivan* v. *Boston Electric Light Co.* 294.
13. Where a witness for the plaintiff in an action for personal injuries against a railroad company, has testified on cross-examination that he signed a certain statement in writing concerning the accident shortly after the accident, and then admits orally the entire contents of the paper as read to him by the defendant's counsel, the exclusion of the paper itself, offered to contradict the witness's previous testimony, is no ground for exception, as the defendant is not harmed by it. *Comerford* v. *New York, etc. Railroad*, 528.
14. The exclusion of a question is no ground for exception if there is nothing to show what the answer would have been, or if the testimony which it was intended to bring out was in fact brought out by the next question. *Leland* v. *Converse*, 487.
15. Where a ruling requested is in part correct and in part erroneous and the party requesting it does not ask for a separate ruling on the correct part, no exception lies to the refusal of the whole ruling. *Gardiner* v. *Brookline*, 162.
16. After a conversation a part of which is admissible has been given in evidence, an exception will not lie to the admission of the conversation as a whole. If the other part of the conversation is inadmissible, the objecting party must ask to have that part of it stricken out. *Smith* v. *Duncan*, 435.
17. The denial of leave to amend at the last moment is not a ground for exception, being a matter of discretion. *Benjamin* v. *Casey*, 542.
18. A declaration at common law by a workman in a stone yard alleged that the plaintiff was injured by the negligence of the defendant in not furnishing suitable and proper dunnage to be placed between the stones of a pile of curbstones which fell upon the plaintiff. The presiding judge

refused a request of the defendant to rule that upon all the evidence the plaintiff was not entitled to recover. The request refused did not refer to the pleadings. The jury returned a verdict for the plaintiff. *Held*, that on the argument of an exception taken by the defendant to the refusal of the ruling, it was open to the plaintiff to contend that the fall of the stones was due not only to the want of proper dunnage but to the stones being piled improperly, as an amendment of the declaration might have been allowed if the attention of the judge had been called to the matter. *Regan* v. *Lombard*, 329.

19. In an action by a brakeman for injuries caused by the plaintiff being caught between two cars of a freight train of the defendant, by the train being started while the plaintiff, by order of the conductor in charge of the train, was engaged in putting in order a defective coupling on one of the cars, the plaintiff elected to go to the jury upon a count which alleged that the plaintiff was injured "by reason of the negligence of some person in the service of the defendant, who had charge or control of a train upon the railroad of the defendant"; and the judge ordered a verdict for the defendant on a count which alleged, that the plaintiff was injured "by reason of the negligence of some person in the service of the defendant, who had charge or control of a locomotive engine upon the railroad of the defendant," but refused to give a ruling that there was "no evidence of any negligence of the engineer causing the accident." The plaintiff had a verdict. The evidence showed, that the plaintiff was in the exercise of due care and did not assume the risk of the accident which happened to him and that the conductor was negligent, but there was no evidence of negligence on the part of the engineer. *Held*, that exceptions by the defendant must be sustained, as the defendant had a right to the express ruling that there was no evidence of negligence on the part of the engineer. *Bowes* v. *New York, etc. Railroad*, 89.

No exception lies to attempt to impeach witness where by negative answer to impeaching question attempt fails, see WITNESS, 1.

Possible error of seven cents too trifling to found exception upon, see SURETY.

Refusal of motion to recommit case to auditor not subject of exception, see *post*, 28.

Exception does not lie where party not harmed, see LANDLORD AND TENANT, 2; EVIDENCE, 3.

As to rulings and instructions being subject of exception, see also *post*, 29–32.

Inconsistent Testimony.

20. Where a witness was instructed, that he could testify to a general rule or practice but not to one or two instances of a certain occurrence, and testified, that he had observed such a practice or rule, and later, on cross-examination, testified, that he could not tell whether the event in question happened once a month, once a week, or once a year, but he should say, that it happened only occasionally, it was *held*, that this inconsistency was not a sufficient reason for striking out the testimony, but that the jury

the motion had made during the trial a previous application to the judge in the lobby, does not dispense with the requirement of Rule 31 of the Superior Court, that facts not appearing on the record shall be verified by affidavit before a motion founded upon them can be heard. The previous application is only material to show that the matter was called to the attention of the judge as soon as it was known. *Borley* v. *Allison*, 246.

26. In deciding that no ground appeared on which it could be held as matter of law that the presiding judge erred in denying a certain motion for a new trial, it was assumed, without deciding, that the discretion in such a case is not unlimited, and that circumstances might arise under which the exercise of the discretion could be revised, although the general rule is that it is not subject to revision on exception or appeal. *Hayward* v. *Langmaid*, 426.

Papers on File.

Papers on file in clerk's office not open to public inspection, see LIBEL AND SLANDER, 5.

Parties.

27. One of two persons owning a horse and wagon in common may recover for an injury to the property in a separate action, where nonjoinder of the other owner is not pleaded in abatement. *Meaney* v. *Kehoe*, 424.

To petition to enforce mechanic's lien where bond has been given and original respondent is dead, see MECHANIC'S LIEN.

Recommitting to Auditor.

28. A motion to recommit a case to an auditor is addressed to the discretion of the court, and an order granting or refusing it is not the subject of an exception or of an appeal. *Craig* v. *French*, 282.

Rulings and Instructions.

29. When a request for a ruling is so drawn that to give it as written might be taken by the jury to convey some intimation from the judge in favor of the party requesting it, the judge for this reason alone may decline to give the ruling in the form requested. *Richardson* v. *Bly*, 97.

30. The refusal of a request for a ruling which singles out only one or two circumstances from many bearing upon the question involved is within the discretion of the presiding judge. *Gunther* v. *Gunther*, 217.

31. If a declaration contains three counts on one of which the plaintiff is not entitled to recover, and the defendant asks for no separate ruling on that count but asks for a general ruling that upon the evidence the plaintiff is not entitled to recover, the ruling should be refused if upon the evidence the plaintiff is entitled to go to the jury on either of the other counts. *Kearns* v. *South Middlesex Street Railway*, 587.

32. At the trial of a petition for an assessment of damages from the limitation of the height of buildings on and near Copley Square in Boston, the judge instructed the jury, that if they found that the petitioner's property was worth as much the day after the act was passed as it was the day before, they should find for the city. The petitioner did not ask the judge

to state to the jury that only special benefits could be offset and not those shared by the public. *Held*, that if the petitioner had wanted more explicit instructions, he should have asked for them, and, having failed to do so, could not object to the charge for not containing them. *Cole* v. *Boston*, 374.

Right to express ruling as to negligence of servant of defendant, see *ante*, 19.

Request for ruling erroneous in part is properly refused, see *ante*, 15.

Submitting Case to Jury.

33. Conflicting evidence is for the jury. *Meaney* v. *Kehoe*, 424.

In action for libel, question whether newspaper account of judicial proceeding is fair report is for jury, see LIBEL AND SLANDER, 1.

Case insufficient to submit to jury in action of replevin, see REPLEVIN.

Surrebuttal.

34. A witness called by a defendant was cross-examined in regard to conversations with a certain witness for the plaintiff, and stated fully all the conversations. He then was asked if he made certain specific statements to the plaintiff's witness, which he denied. The plaintiff's witness then testified in rebuttal that the defendant's witness had made to her the statements which he denied making. Thereupon the defendant's witness was recalled and was asked to state what conversations he had had with the plaintiff's witness. This on objection was excluded. *Held*, that the exclusion was no ground for exception; that, whether the witness should be allowed on surrebuttal to testify again to conversations already given, was a matter within the discretion of the presiding judge as to the conduct of the trial. *McLean* v. *Paine*, 287.

Verdict.

Judgment on general verdict barred by discharge in bankruptcy where uncertain what, if any, items were created by fraud of bankrupt, see BANKRUPTCY.

PRACTICE, CRIMINAL.

Appeal.

1. An appeal to the Superior Court by a person convicted of an offence and sentenced to imprisonment by a district or police court, including the Municipal Court of the City of Boston, taken after the mittimus has been issued and the prisoner has been removed from the court, is taken too late. *Weiner* v. *Wentworth*, 15.

Right of defendant in criminal case to have appeal entered does not become moot question by reason of his having served his sentence, see MANDAMUS.

Exceptions.

2. A remark of a district attorney in the course of a trial is not the subject of exception. *Commonwealth* v. *Rogers*, 184.

New Trial.

3. The refusal of the judges who presided at a murder trial to grant a new trial, asked for on the ground that one of the jurors was deaf, the judges stating that they are satisfied that the juror heard substantially all the evidence, is not the subject of an exception and should not be brought before this court. *Commonwealth* v. *Best*, 545.

Preliminary Finding of Fact.

4. At the trial of an indictment for a conspiracy to procure persons to vote illegally at a certain caucus, the presiding judge, as the ground for admitting the declarations of one defendant as evidence against the others stated his ruling that there was sufficient evidence of a conspiracy against all the defendants. *Held*, that the ruling was right and the statement of it proper. When a preliminary finding of fact on the part of the judge is necessary for such a purpose there is no duty to conceal it from the jury. *Commonwealth* v. *Rogers*, 184.

Testimony of Fellow Conspirators.

5. On a trial for conspiracy the weight of the testimony of fellow conspirators properly is left to the jury. *Commonwealth* v. *Rogers*, 184.

PRESCRIPTION.

Extent and character of easement in way by prescription, see WAY, 3, 4.

PROBATE COURT.

1. The Probate Court has no jurisdiction to confirm agreements of compromise under Pub. Sts. c. 142, § 14, and a decree of that court purporting to confirm such an agreement is void. *Abbott* v. *Gaskins*, 501.
2. In a suit in equity to enforce a contract to purchase certain land from the plaintiff, where the only defence was that the plaintiff could not give a good title, it appeared, that the plaintiff claimed under a deed from the executors under a certain will and that the will had been allowed by the Probate Court in pursuance of an agreement of compromise under Pub. Sts. c. 142, § 14, which had been confirmed by another decree of the same Probate Court immediately preceding. The decree allowing the will provided that the will was to be administered in accordance with the agreement of compromise confirmed by the preceding decree. The will gave the executors power to sell real estate. *Held*, that the plaintiff had no title because the Probate Court had no jurisdiction to confirm an agreement of compromise under Pub. Sts. c. 142, § 14; and the bill was dismissed. *Ibid.*

RAILROAD.

Liability for Fire.

As to construction and validity of St. 1895, c. 293, giving to railroad companies held liable for injury by fire benefit of insurance payable to owner, see CONSTITUTIONAL LAW, 5.

Obligation to fence.

1. The statutory obligation of a railroad to fence, imposed by Pub. Sts. c. 112, § 115, amended by St. 1882, c. 162, is an obligation not to travellers but only to adjoining owners. *Byrnes* v. *Boston & Maine Railroad*, 322.
2. A railroad company is under no obligation to maintain a fence between its tracks and its freight yard or between its freight yard and an adjoining street. *Ibid.*

Liability for accident on bridge built under order of county commissioners, see NEGLIGENCE, 4, 5.
Rights of postal clerk working in postal car, see CARRIER, 2.
Negligence on railroad, see NEGLIGENCE, 1–12.

RECEIVER.

In a suit by stockholders to enjoin the directors of a foreign corporation from doing business *ultra vires* and to compel them to account for property of the corporation misappropriated by them, the appointment of a receiver generally is not necessary or proper, although it is possible that a special case might arise in which such an appointment would be justified. *Richardson* v. *Clinton Wall Trunk Manuf. Co.* 580.
Action begun by corporation may be changed by amendment into action by receiver of its property, see PRACTICE, CIVIL, 3.

REGISTRATION.

Attachment of realty made under wrong name, effective against subsequent purchaser without notice, see ATTACHMENT, 1.

RELEASE.

Release of assignee for benefit of creditors by holder of note does not discharge assignor's liability for unpaid balance of note, see ASSIGNMENT, 2.

REPLEVIN.

In an action of replevin against a deputy sheriff for attaching goods on certain premises, there was only one witness and only by picking out particular expressions used by him and depriving them of their context or the reasonable explanations by which they were followed could even the form of a case be made out, to show that the plaintiff was the tenant of the premises and in consequence in possession of the goods when attached. *Held*, that the evidence was not sufficient to submit to the jury. *Hayes* v. *Tidsbury*, 292.

REVERE.

Proceedings by board of survey of, to lay out highway, see TAX, 5.

RULES OF COURT.

SALE.

Delivery.

The owner of a brick yard in the town of Harvard agreed to furnish two hundred thousand bricks at $5 per thousand to be delivered in Worcester. A few day later he gave the buyer a bill of sale of the bricks, in which they were described as two hundred thousand bricks, more or less as desired, to be shipped from the northerly end of a certain kiln consisting of the first ten arches. The buyer thought he was buying merchantable bricks ready for delivery, and paid for them at once $800, retaining $200 to pay the freight. By agreement the buyer went to the brick yard where there were nine and a half arches of bricks set up and connected together but not burned. They were at the southerly end of the kiln named. The seller said, "These are your brick," and placed his hand on the arches, saying "Here are nine and one half arches, and there should be ten arches, which they are drawing in at the present time." The buyer said he was not ready to use the bricks, and the seller informed him that he could let them lie there as long as he pleased. *Held*, that this evidence would warrant a finding, that there was a sale and delivery of the bricks; that although the buyer when he took the bill of sale supposed he was buying merchantable bricks and the arches were described as being ten at the northerly end of the kiln, he finally accepted in performance of this contract a delivery of nine and a half arches of unfinished bricks at the southerly end, with the understanding that they were to be completed by the seller, the delivery being such as the nature of the property allowed. *Whittle* v. *Phelps*, 317.

SAVINGS BANK.

SCHOOL.

Hearings before School Committee.

1. In an action against a city for the alleged unlawful exclusion of the plaintiff from its public schools, a record of the school committee was put in evidence which stated that the plaintiff had had an opportunity to be heard on the charges against him. Oral evidence was introduced as to the proceedings at the hearing. In holding that the finding of the school committee made in good faith after a hearing could not be revised, the court assumed that the plaintiff was not precluded by the record from showing

Statute (*continued*).

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 689.

STOCK EXCHANGE.

STREET RAILWAY.

SUPREME JUDICIAL COURT.

SURETY.

a mortgage on other land then standing in the name of the defendant, that the land in question was conveyed to the defendant, the deed being placed in the possession of the plaintiff, and that the defendant accepted the conveyance with the oral agreement made with his mother and the plaintiff, that whenever requested to do so by his mother he should convey the land to the plaintiff, and that in the meantime he should permit the plaintiff to occupy the land free of rent on paying taxes and for repairs on the house and buildings, that under this agreement the plaintiff entered and occupied the premises openly and exclusively and made expenditures and improvements upon the estate with the knowledge of the defendant, that the mother requested the defendant to convey the land to the plaintiff which he refused to do, and, the mother having died, the plaintiff demanded a conveyance of the land from the defendant. On demurrer *held*, that the bill could not be sustained; that the facts alleged did not establish a resulting trust, nor any trust, in favor of the plaintiff, and that there was no such performance on the plaintiff's part as to take the case out of the statute of frauds. *Semble*, that on the facts alleged there might have been no trust in favor of the mother and no consideration for the alleged agreement of the defendant. *Perkins* v. *Perkins*, 401.

Spendthrift Trust.

2. A trust, created by will for a granddaughter, providing, that the income shall be paid into her hand, or upon receipts or orders signed by her immediately before the payment, and that the trustees may in their discretion decline to pay her anything, and apply only so much as they see fit to her maintenance and support, or the education, maintenance or support of her children, and accumulate the balance until after her death, gives the beneficiary no absolute right of control or alienation, and so no interest which can be reached by creditors. *Nickerson* v. *Van Horn*, 562.
3. In a trust created by a charge upon land, to pay an annuity to a beneficiary, a provision, that the payments shall be made only upon "receipts or orders therefor signed by her at or immediately before the payment thereon, and not by way of anticipation," is equivalent to saying that the beneficiary shall have no power to alienate the annuity, and she therefore has no interest in it that can be reached by creditors. *Ibid.*

Discretion of Trustee as to Investments.

4. In 1885 and 1886 trustees under a will bought and held bonds of a small western railroad, which did not pay its operating expenses, guaranteed one half each by two great railroad companies between whose roads it ran. Both great companies became insolvent, but one of them in reorganization made a provision for its guaranty which exceeded in value one half of the original investment. On an appeal by a life tenant from a decree allowing the accounts of the trustees, it was *held*, that it did not appear that the trustees were wanting in sound discretion in purchasing the bonds in 1885 and 1886 and in retaining them afterwards. *Green* v. *Crapo*, 55.
5. Trustees under a will received from the executor in 1870 shares of a manufacturing corporation at $95 a share. The stock paid dividends

until 1881 when it stood at $100 a share. The next year it dropped, and continued to go down until in 1885 it became worthless. The trustees were men of good business capacity and experience, their honesty was not disputed, and they were successful in the management of the trust as a whole. On an appeal by a life tenant from a decree allowing the accounts of the trustees, it was *held*, that it did not appear that the trustees were wanting in sound discretion in keeping the stock. *Green* v. *Crapo*, 55.

Retention of Unproductive Property.

6. A testatrix died leaving an undivided half interest in unproductive land which was but a moderate fraction of a large estate. The other half belonged to the life tenant under the will. Nearly all the rest of the trust fund was invested in interest bearing or dividend paying securities. The will directed the trustees to sell all portions of the estate which were unproductive "and which in their judgment ought to be sold." It also directed, that from the rents, profits and income from the property the trustees should pay all taxes, expenses and commissions, "and the balance of said rents, profits and income shall be deemed to be the net income from the said estate; and I direct the said Trustees to pay the said net income" to the life tenant. During twenty-six years the life tenant received an income of about three and three quarters per cent on the whole property, and in the meantime the capital increased substantially in value. The life tenant during the whole period did not want the land sold and was unwilling to sell her share, and the trustees continued to hold the half interest in the unproductive land. On an appeal by the life tenant from a decree allowing the accounts of the trustees, the life tenant contended that she should be allowed interest on the fair selling value of the land retained. *Held*, that, apart from the definition of net income in the will, the trustees could not be made liable for failing to sell land which they expressly were authorized to keep if they thought it wise, and which practically could not have been sold without the concurrence of the life tenant who refused to give it. *Green* v. *Crapo*, 55.

Termination.

7. A testator devised land to F. H., his sole heir at law, in trust to pay to J. T. such part of the income as he saw fit until the death or divorce of F. H.'s wife, and upon the termination of the trust during his life to F. H. absolutely, or if F. H. died before the death or divorce of his wife then to J. T. F. H. died before either the death or divorce of his wife. On a writ of entry by the heir at law of F. H. and a writ of dower by his widow against J. T., to set aside the devise on the ground that it was fraudulently procured by F. H. upon a secret trust for an illegal purpose, it was *held*, that even if there were a remedy at law in such a case, and if one claiming under F. H. could prevail by reason of F. H.'s fraud, and if the trust was illegal, still the illegal trust terminated with the death of F. H. and the remainder to J. T. was not affected by it. *Ham* v. *Twombly*, 170.

TRUSTEE PROCESS.

UNION FREIGHT RAILROAD COMPANY.

VINEYARD GROVE COMPANY.

WAGERING CONTRACTS.

WAIVER.

WAY.

Extent of Easement.

In way by grant.

1. If a right of way is granted and nothing more appears from the deed or the attending circumstances, the owner of the servient tenement may build over the way or do anything else so long as he does not interfere with or obstruct the right of passage over the soil. *Crocker* v. *Cotting*, 146.
2. A way created by deeds to the abutters was originally designed as a passageway in the rear of lots intended for dwelling houses on Boylston Street in Boston, the grantor retaining the fee, and there being when some of the deeds were given a building immediately abutting on the way with windows in the second, third and fourth stories opening upon it. *Held*, that the way was shown by the attending circumstances to have been granted as an open way and that it could not be arched over by the owners of the fee. HOLMES, C. J., HAMMOND & LORING, JJ., dissenting. *Ibid.*

In way by prescription.

3. When a right of way has been acquired by prescription over a path steep in grade and during the whole of the use a railing has been maintained there reasonably necessary to the convenient use of the path in the winter season, the easement is the right not only to use the path but to use it with the railing. *Baldwin* v. *Boston & Maine Railroad*, 166.
4. The plaintiff had a right of way by prescription from a gate in his back fence along a path over the defendant's land to a railroad station of the defendant. When the right was acquired there was one dwelling house on the plaintiff's lot. The plaintiff built on the lot two additional houses with two tenements in each. The defendant denied the right of the plaintiff's tenants to use the path. *Held*, that the character of the use had not changed, and a finding was justified, that no additional burden was imposed on the land of the defendant by the increased number of persons using the path in the same way. *Ibid.*

Defect in Highway.

5. The absence of a guard or barrier on the top of a wall which is level with a highway, the land beyond being about three feet lower, opposite a place where a stone crusher and quarry are operated, may be found to constitute a defect in the highway. *Coles* v. *Revere*, 175.
6. If a horse shied from fright but his driver instantly would have regained control of him had there been a barrier to prevent his going over the top of a wall on a level with the highway, a town may be found to be liable for an injury to the driver caused by the absence of such a barrier, if it ought to have maintained one there, whether the horse was frightened through the negligence of a third person or otherwise. *Ibid.*

Town Way.

7. In St. 1896, c. 417, authorizing the town of Revere to elect a board of survey to have charge of the location of highways, the word "highway" includes a town way. *Janvrin* v. *Poole*, 463.

Way by prescription cannot be determined on petition under St. 1889, c. 442, see INCUMBRANCES, 1.

As to incumbrances created by Boston board of survey, see INCUMBRANCES, 2.

Manner of taking objection that petition for damages from widening and alteration of highway was not filed in time, see PRACTICE, CIVIL, 1.

Laying out of way by Revere board of survey, see TAX, 5.

Assessments for betterments on parkways not to be laid until section of parkway in question is completed, see METROPOLITAN PARK COMMISSIONERS.

Validity of assessment for betterments, see TAX, 4, 5.

Change of grade of public way by railroad company wholly without authority does not raise an estoppel to deny authority, see ESTOPPEL, 1.

WIDOW.

Allowance.

1. The fact that a widow has lived apart from her husband for several years before his death does not prevent an allowance to her as necessaries under Pub. Sts. c. 135, § 2. *Welch* v. *Welch*, 37.
2. A delay of about a year and a half by a widow in filing a petition for an allowance as necessaries under Pub. Sts. c. 135, § 2, accounted for by the fact that negotiations for a compromise between her and the heirs of her husband's estate were pending, is not a bar to the petition. *Ibid.*

WILL.

Undue Influence.

1. Some influence may be exercised upon a testator by a devisee or legatee which is not undue. *Bacon* v. *Bacon*, 18.
2. The fact that a certain person was at the same time the friend, housekeeper and nurse of a testator does not as matter of law create a suspicion of undue influence. *Richardson* v. *Bly*, 97.
3. There may be found to have been undue influence invalidating a will, although the will was prepared, in the absence of the person alleged to have exercised the undue influence, by the usual counsel of the testator at the counsel's office from a draft brought there by the testator himself and from oral instructions then given by the testator and was then and there executed. *Dresser* v. *Dresser*, 93.
4. On the issue, sent to be tried in the Superior Court, whether a certain testator was induced to execute the instrument purporting to be his will by the undue influence of his third wife, it was *held*, that, on the evidence stated in the opinion, the trial judge was warranted in submitting

the issue to the jury, and the jury were warranted in finding that a domination amounting to undue influence was established over the testator by his wife and was exercised against the interest of his eldest son, and in answering the issue in the affirmative. *Dresser* v. *Dresser*, 93.

Burden of Proof and Presumption of Sanity.

5. Where a will is contested on the grounds of unsoundness of mind and undue influence the burden is on the executor to prove soundness of mind and on the contestant to prove undue influence. *Bacon* v. *Bacon*, 18.
6. In the absence of evidence to the contrary there is a presumption of the sanity of a testator. If evidence is introduced to rebut this presumption the burden of proof is on the executor to prove sanity on all the evidence including the presumption. *Richardson* v. *Bly*, 97.

Witness not expert cannot be asked whether alleged testator was subject to delusions or hallucinations, see EVIDENCE, 11.

For construction of wills, see DEVISE AND LEGACY, 1–7.

For compromises concerning wills, see PROBATE COURT, 1–2.

WITNESS.

Impeachment.

1. Where an attempt is made in cross-examining a plaintiff to impeach her credibility by showing that she is a spiritualist, and she says in answer, that she is not a spiritualist, it does not matter whether this was admissible or not, as the attempt failed and did the plaintiff no harm. *Thompson* v. *Cashman*, 36.
2. In an action by a married woman, her husband was a witness for her and was asked on cross-examination, whether he had not a few days before in the trial of another case testified contrary to the testimony which he gave on his direct examination, and was allowed to answer. The court assumed in deciding the case, that the witness's testimony on his direct examination was true. *Held*, that so far as the questions put and the answers given tended to contradict the witness they were admissible, and whether the cross-examination went further than that was immaterial. *Riley* v. *Tolman*, 335.

Cross-examination of Defendant in Criminal Case.

3. At the trial of a man and woman on a complaint for keeping a house of ill fame, the man testified on direct examination that he was the husband of the other defendant. On cross-examination he testified, against his objection, that at the time of his marriage to the defendant he was married to another woman still living from whom he had not been divorced. *Held*, that the cross-examination properly was allowed; that the witness by testifying in his own behalf had submitted himself to cross-examination on all matters relevant to the issue, and that the question whether the two defendants were married or not was relevant to the issue, and therefore

WORDS.

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